

Supreme Court of the United States

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX TO APPENDIX

	Page
I. <i>Docket Entries</i>	1
II. <i>Excerpts from the Record in Case No. 66C.218(3)</i>	3
1. Motion to Vacate Sentence	3
2. Supplemental Motion to Vacate	12
3. Affidavit of Patricia Scott	15
4. Opinion of United States District Court for the Eastern District of Missouri denying Motion to Vacate, Regan, J.	17
5. Order of United States District Court for the Eastern District of Missouri denying leave to appeal in forma pauperis	27
6. Order of United States Court of Appeals for the Eighth Circuit denying leave to appeal in forma pauperis	28

	Page
III. <i>Excerpts from the Trial Transcript in Case No. 84 Cr.</i>	
12(3)	29
1. Opening statements	30
2. Testimony of Lloyd Woollen	38
3. Testimony of Marcelle Lorenz	48
4. Testimony of John Dedert	49
5. Testimony of John Davis	50
6. Testimony of Charles Stahl	53
7. Testimony of Clifford Martin	64
8. Testimony of John Light	66
9. Testimony of William H. Petersen	69
10. Testimony of John L. Newcomer	72
11. Testimony of Albert J. Rushing, Jr.	80
12. Testimony of Patricia Scott	87
13. Testimony of Dr. John Davidson	90
14. Testimony of George Peet	92
15. Testimony of Franklin J. Walls	115
16. Closing arguments	121
17. Instructions to jury	140
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	148

DOCKET ENTRIES

66 C 218(3)

- Motion to Vacate Sentence, filed June 13, 1966
- Memorandum of the Government, filed July 19, 1966
- Court Order, filed August 10, 1966
- Motion to Withdraw as Attorney for Petitioner, filed August 20, 1966
- Motion for Removal, filed August 29, 1966
- Court Order, filed September 1, 1966
- Motion to Proceed in Forma Pauperis with supporting affidavit, filed September 9, 1966
- Motion for Leave to File Supplemental Motion to Vacate Sentence, filed September 9, 1966
- Supplemental Motion to Vacate Sentence "lodged", filed September 9, 1966
- Motion for Admission of Documents as Official Records, or in the Alternative for Issuance of Subpoenas, filed September 22, 1966
- Motion for Subpoenas Duces Tecum at Expense of Government, filed September 22, 1966
- Application for Writ of Habeas Corpus ad Testificandum, filed September 22, 1966
- Motion to Call Expert Witness under Rule 28, F.R.C.P., filed September 22, 1966
- Motion for Subpoenas at Expense of Government, filed September 22, 1966
- Court Order, filed October 6, 1966
- Court Order, filed October 6, 1966
- Court Order, filed October 6, 1966
- Motion for Rehearing of Petitioner's Motion to Subpoena at the Expense of the U.S., filed October 20, 1966
- Court Order, filed October 26, 1966
- Memorandum for Clerk, filed November 9, 1966

Court Order, filed November 9, 1966

Memorandum Opinion and Order, filed March 16, 1967

Motion to Proceed in Forma Pauperis and Affidavit, filed
March 22, 1967

Court Order, filed March 27, 1967

Notice of Appeal, filed April 19, 1967

Certified copy of Order of U.S.C.A., filed May 11, 1967

EXCERPTS FROM THE RECORD IN CASE No. 66 C 218(3)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
St. Louis, Missouri

66C 218(3)

HAROLD KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

MOTION TO VACATE SENTENCE—Filed June 13, 1966

Harold Kaufman—Petitioner Pro Se
Box PMB # 88176-A
Atlanta, Georgia 30315

Comes the petitioner in person, pursuant to Section 2255, Title 28, U.S.C.A.—see Sanders v. United States, 373.

STATEMENT

Petitioner was tried in the United States District Court for the Eastern District of Missouri, for an alleged robbery of a Federally insured savings and loan association, in violation of 18, U.S.C. 2113(A), and d.

Petitioner's primary defense was insanity at the time of the physical acts constituting the crime, but no other defenses were waived.

REASONS FOR GRANTING THE MOTION

I.

Was Petitioner's condition at the time he was under the drug (Librium) such as to warrant him to consult with defense counsel during the course of the trial?

It is urged here that defense counsel could have not effectively given petitioner the assistance of counsel as required by the Due Process clause of the Fifth Amendment to the Bill of Rights. He makes no direct charge that defense counsel in the trial court did not discharge his duties and obligations required in criminal cases for the defense of accused persons on trial, such counsel had no cooperation from the petitioner to give him information as to dates, names, and places that would have been relevant to his defense. The record discloses that petitioner was under the influence of drugs at the time of trial; therefore, his cooperation being an essential factor in assisting his counsel as to events, dates, and places, was lost in the course of the proceedings in the trial court and his failure to cooperate with defense counsel caused ineffective representation denying him of due process of law. Was petitioner being given drugs while confined and during the course of the trial? The record discloses that the Warden, Mr. William Boeger, of the St. Louis Jail, testified that petitioner was being administered drugs.

DIRECT EXAMINATION

By Mr. Barsanti: (Tr. 254-255, 256).

Q. Do you have with you the records of Harold Kaufman, Warden, who has been in your jail?

A. I do, sir.

Q. Would you refer to the records and indicate, see whether they indicate whether any drugs have been prescribed to Harold Kaufman?

A. On March 21, 1964, the doctor's notation is Librium T.D.A.S. Milligrams.

Q. Has he been receiving that since that time?

A. That is right, sir.

Mr. Barsanti: No further questions.

CROSS EXAMINATION

Q. Doctor, on March 21, he was given 5 milligrams of Librium, according to your records?

A. According to our records, yes.

Q. Do you have any records of any other date on which he was getting anything?

A. Well, it's been continuous, sir, since that date. What happens, the pills are gotten from a drug store, Grand and Gravois Drugstore, and delivered two or three different times, they have, I think they have refilled that prescription, but he is still taking them, and has continuous since that date. Id (Tr. p. 254-55-56).

In the case at bar, it is clear that petitioner was on trial for a serious offense and could not cooperate with his defense attorney in that he was under the influence of a drug which caused him to be inactive and unable to participate in such defense in reference to events and dates and names of persons which would have proved essential to his attorney. The drug was being administered continuously according to the record and the Warden's testimony. It does not say how often he was given the 5 mm of Librium, where, as here, petitioner was taking such drugs like he was being given aspirins, which caused him to be in a state of mind that rendered him useless during the course of the trial. It is urged here that denial of effective assistance of counsel violates due process of law. *Powell v. Alabama*, 287 U.S. 45, 69; *Johnson v. Zerbst*, 304 U.S. 458; *Glasser v. United States*, 315 U.S. 60, 70, 72. It is urged here that where a defendant is being represented by an attorney and he fails to be cooperative with the counsel that such is a nullity and he is in fact denied due process of law as provided for by the Fifth Amendment. It is clear that the trial court should have determined the question of petitioner's ability to cooperate with his attorney and in finding that he was under the influence of a drug should have declared him not competent to stand trial and declare a mistrial when

such facts were brought to the court's attention. Even though there was not a pre-trial motion that the petitioner was under the influence of Librium, it was disclosed to the court below during the course of the trial (Tr. 254-55-56), and it was the duty of the trial judge to make a determination at that point, whether petitioner was mentally capable of cooperating with his counsel; therefore, petitioner did not waive his right to due process of law, where, as here, he could not have the effective aid of his counsel as required by *Powell v. Alabama, Supra*, 287 U.S. 45, 69, the ineffectiveness of his representation was due to his failure to consult with counsel as to names of persons, dates and events that would have been material to his defense and resulted in a verdict of not guilty. Obviously, this Honorable Court cannot lightly cast aside that the record fails to disclose such facts, in that.

MOTION FOR NEW TRIAL

The Court: As to No. 7, it was not developed, and certainly there was no pre-trial motion by counsel that the defendant would receive Librium.

Mr. Barsanti: I didn't know it, your honor.

The Court: And there was no request that the trial be discontinued so that will be overruled. Now what else have you got?

Here the record is clear that it was known that petitioner was under the influence of Librium during the trial in that the Warden of the jail disclosed it by his testimony (Tr. 254, 255-56). Where such evidence disclosed to the trial court that Librium was being administered to the petitioner, it was the duty of the trial judge to make a determination as whether or not such drug was being administered in amounts that would cause him to be in a state of mind that would cause him not to cooperate during the trial.

The record further discloses that petitioner at the time preceeding; during and after the trial was receiving outpatient treatment at the City Hospital # 2 (see record of Marshal), the petitioner made over six visits to the clinic with severely ulcerated leg. He lost over thirty

pounds and was physically as well as mentally ill. Warden of the City Jail of St. Louis testified at petitioner's trial in the Southern District of Indiana:

"Harold Kaufman was a mentally disturbed individual, you couldn't talk sense to him. He ranted and raved, walked up and down all the time. He locked himself up in solitary confinement because he was afraid he might kill himself."

Petitioner does not say that defense counsel was incompetent or failed to defend him to the best of his ability; to the contrary, the petitioner has stated and will state again that his attorney gave petitioner the only representation that was available as to the defense at that time. Defense counsel had no cooperation from petitioner and it passed on to defense counsel a difficult problem to prepare the case and defend it as to give the petitioner the effective assistance of counsel as required by the Fifth and Sixth Amendments to the Constitution. *Johnson v. Zerbst*, 304 U.S. 458; *Powell v. Alabama*, 287 U.S. 45; *Glasser v. United States*, 315 U.S. 60, 70, 72.

It is urged here that when all of the facts are considered in light of the record and petitioner's inability to cooperate with his defense counsel it cannot be said he had that fair trial as provided for by the Sixth Amendment to the United States Constitution. His inaction and silence as to being unable to cooperate with defense counsel while he was under the influence of Librium is evidence in itself sufficient to justify a reversal of the conviction and grant the petitioner a new trial. At the present time, he is not under the influence of Librium nor is he physically sick, and he is not in a jail from where he was administered drugs and kept him at disadvantage during his trial and at times caused him undue hardships depriving him of due process of law and rights secured to him by the Federal Constitution. Under such circumstances, how can it be said that petitioner had that fair and impartial trial as required by the laws and Constitution of the United States. The right to have the assistance of counsel is a right guaranteed by the Sixth Amendment to the Bill of Rights. The right to have due process

of law is a right guaranteed by the Fifth Amendment. Such rights are manditory and life and liberty cannot be dispersed with if there is a showing that due process of law was violated in a criminal trial before a jury, as was said in *Glasser v. United States, Supra*, 315 U.S. 60, 70, 72, that:

"The Bill of Rights are the protecting bulwark against reach of arbitrary power deemed necessary to insure human rights of life and liberty and a federal court can not constitutionally deny an accused of the assistance of counsel. * * *"

In the case at bar, how can the petitioner have had effective assistance of counsel if he was under the influence of Librium and physically sick during his trial; how could counsel serve him and discharge his obligation to protect petitioner if the influence of such drug caused him to be inactive and unable to cooperate? Here there is a record disclosing a severely disturbed person, mentally as well as physically sick being administered drugs during the course of a criminal trial in Federal Court. Under such circumstances surrounding the instant case, it can not be said that he had the due process of law as required by the Fifth Amendment. Nor can it be said he had the effective assistance of counsel as required by the Fifth and Sixth Amendments to the Bill of Rights. As was said in *Glasser v. United States, Supra*, 315 U.S. 60, 70, 72, "Denial of effective assistance of counsel violates due process of law."

It is urged here that had petitioner been without the physical pain, under the influence of a prescription drug, he could have brought forth certain crucial parts that would have aided his court-appointed attorney, to procure witnesses, relative to his mental condition at the time of the alleged crime. Further, he would have been able to procure witnesses to prove the truthfullness of Pat Scott, the chief lay witness for defense.

How much and how many drugs were being administered to the defendant? For eighty-seven days in the Federal Medical Center petitioner was given approximately 2,175 mm. of Librium; approximately 4500 mm

of Librium in the St. Louis City Jail; and immediately after the trial 15,000 mm. of Thorozene in West Street Federal House of Detention; also, 15,000 mm of Benedril at the House of Detention. In view of all these medications prescribed by various doctors, how can this court or any court of the United hold that a defendant in a criminal case can be cooperative in assisting his counsel before, during, and immediately after his trial? How can this Court say defendant had due process of law as provided for by the Sixth Amendment to the Bill of Rights? When the record is fully reviewed in light of all the Medical records it spells out that defendant did not have that fair and impartial trial as guaranteed to him by the Sixth Amendment.

It is respectfully urged that this Court consider the facts, that:

In Sohol's Handbook of Federal Habeas Corpus (1965), and in particular with discussion as to Title 28, Section 2255, the following at page 134 is set forth:

"It cannot be stressed too much that the language of section 2255 itself *requires a hearing with findings of fact and conclusions of law*, (4) unless the motion and the files and the records of the case conclusively show, that the prisoner is entitled to no relief. . . ." (Emphasis in original)⁸⁵

Thus it can be seen that the statute imposes upon the sentencing court an affirmative duty to look into the records of the case. Only if they conclusively show that the petitioner is entitled to no relief, can the motion be dismissed without a hearing.

In addition to the above, the Supreme Court has made a further suggestion:

"Finally, we remark that the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the

⁸⁵ *Reed v. United States*, 291 F.2d. 856-57 (4th Cir.)

grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusiv-
 nal, or inartistically expressed. He is free to adopt
 any appropriate means for inquiry into the legality
 of the prisoner's detention in order to ascertain all
 possible grounds upon which the prisoner might claim
 to be entitled to relief." ⁸⁸

"It ought not be necessary to add that if there exists
 any doubt whatsoever as to whether to hold a hearing,
 the hearing should be held."

In numerous decisions, the New York Court of Appeals
 has declared unequivocally that in coram nobis motions a
 petitioner must be afforded a hearing upon disputed alle-
 gations which, if proved, would entitle him to a writ un-
 less the record shows conclusively that the allegations are
 false and unless there is no reasonable probability at all
 that the defendant's averments are true. The fundamen-
 tal right of hearing is guaranteed even though a defend-
 ant's allegations may seem "improbable or unbelievable"
 and though they "may tax credulity". See e.g., *People v.*
Langan, 303 N.Y. 474, 477 (1952); *People v. Richetti*,
 302 N.Y. 290, 296 (1951); *People v. Guanzlia*, 303 N.Y.
 338, 343, (1951); *People v. Silverman*, 3 N.Y. 2d 200,
 203 (1957); *People v. Picciotti*, 4 N.Y. 2d 340, 344
 (1958).

Petitioner grants that he was sent to the United States
 Medical Center, Springfield, Missouri, for an examina-
 tion as to his competency to stand trial, and as of Feb-
 ruary 1964, he was returned as competent to assist in
 his defense even though suffering from a major mental
 illness, "Schizophrenic Reaction, Paranoid type, in PAR-
 TIAL rather stable remission." This adjudication in
 February did not absolve this Court of its duty in Au-
 gust 1964, of ordering a hearing *sua sponte*, when the
 fact of his being under tranquilizers during the pre-trial
 period and trial period was brought to its attention, as
 was done here, by Warden Boeger, of the St. Louis City
 Jail. Certainly this Court excepts the fact "that the con-

⁸⁸ *Sanders v. U. S.*, 373, U.S. 1, 22 (1963)

viction of an accused person while he is legally incompetent violates due process." *Bishop v. United States*, 350 U.S. 961, 1956).

Here, as previously stated, we have an accused person facing a sentence of twenty-five (25) years, admittedly suffering a mental illness, partially in remission in ———, taken to trial, while under the confining influence of a prescription drug, where a Warden testifying he was mentally disturbed, ranting and raving, yet during the trial he said nothing, did nothing, to assist his counsel. Further, can it be said an attorney of Mr. Barsanti's skill would not have brought forth his behavior while confined had he known?

Petitioner has no funds to employ an attorney; therefore, he must present this petition pro se. All medical records can be produced under subpoena of this Court. Petitioner, therefore, must rely on his sworn oath of verity, yet assures this court upon a proper hearing he can produce all medical documents to prove all his allegations. This is the only definite means to afford petitioner due process of law as is his right under the Fifth Amendment to the Constitution, and to have further proceedings under 2255, a full and complete review of his conviction must be held.

WHEREFORE, petitioner respectfully prays that this petition for a hearing pursuant to 2255, Title 28, be granted. That he have other and different relief that may seem meet and just to this Honorable Court.

Respectfully submitted,

/s/ Harold Kaufman
HAROLD KAUFMAN
Petitioner Pro Se
Box PMB # 88176-A
Atlanta, Georgia 30315

Dated:

June 8th, 1966.

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 66C 218(3)

HAROLD KAUFMAN, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

SUPPLEMENTAL MOTION TO VACATE SENTENCE—

Lodged September 9, 1966

Comes now the Petitioner, HAROLD KAUFMAN, by and through his attorney of record, A. H. HAMEL, and by leave of Court first had and obtained files his Supplemental Motion to Vacate Sentence and moves this Court, pursuant to 28 U.S.C. Sec. 2255, to enter an order vacating his sentence.

1. Petitioner realleges and incorporates by reference each and every allegation contained in Petitioner's Motion to Vacate Sentence heretofore filed herein.

2. Petitioner is presently serving a sentence for twenty years for the alleged robbery of a federally insured savings and loan association in violation of 18 U.S.C. 2113 (a) and (d) imposed by the United States District Court for the Eastern District of Missouri on or about the 27th day of August, 1964. A copy of the judgment of that Court is attached to this supplemental petition as Exhibit "A". Petitioner was heretofore confined in the United States Penitentiary at Atlanta, Georgia and by prior order of this Court was removed to the City Jail in the City of St. Louis for the purposes of Petitioner's Motion to Vacate Sentence heretofore filed herein.

3. The conviction and sentence pursuant to which Petitioner is being detained was imposed in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The facts showing the constitutional violations herein alleged are as follows, to-wit:

(a) Petitioner was given the drug Librium while incarcerated in the St. Louis City Jail (Tr. pp. 254-256) and in addition, Petitioner states and alleges that other drugs were administered to him prior to, during and subsequent to the date of trial. It is Peti-

tioner's contention and belief that the administration of such drugs resulted in violation of rights guaranteed to him by virtue of the Fifth and Sixth Amendments to the Constitution of the United States of America in that the drugs made him incapable of cooperating fully with his counsel in preparing for trial, thereby depriving him of the effective assistance of counsel; and that the drugs affected his appearance and demeanor adversely during the trial, in effect forcing him to testify against himself in an incriminating manner.

(b) That prior, during and subsequent to the aforesaid trial, Petitioner was otherwise incompetent to participate in said trial for the reason that he was physically and emotionally sick. That during and after the trial the Petitioner continued to receive outpatient treatment at the City Hospital No. 2. (See record of Marshall). Petitioner made over six visits to the clinic with a severely ulcerated leg. He lost over 30 pounds and was physically as well as mentally ill. As a result, counsel for defense had no cooperation from Petitioner in the preparation and defense of the aforesaid case and was unable to give the Petitioner the effective assistance of counsel as required by the Fifth and Sixth Amendments to the Constitution.

(c) On the trial of the case, a gun, \$11,250.00 worth of American Express Travelers Checks and several other physical objects were admitted into evidence. These items had been removed from Petitioner's car without a search warrant after his arrest for a traffic violation and after his car had been towed to a garage. A garage attendant discovered the gun approximately one-half hour after the arrest. (Tr. pp. 74, 81, 102-112). Other objects were discovered by F.B.I. agents approximately four and one-half hours after the arrest. (Tr. 72, 102-112). Trial counsel objected to the introduction into evidence of said items for the reason that such items were obtained by reason of an unlawful search and seizure in violation of the Fourth Amendment to the Constitution of the United States of America.

(d) On May 15 and June 2, 1964 Petitioner's trial counsel filed motions for the issuance of subpoenas, together with Petitioner's supporting affidavits setting forth the addresses of certain proposed witnesses and the need for and nature of their testimony. (District Court Record Pages 45, 46, 56, 61). One witness so requested, Marian Blake, did not appear and Petitioner was effectively denied the value of her testimony. It is alleged upon information and belief that one Richard Stein, United States Attorney, Southern District of Indiana, stated that Marian Blake's whereabouts were known and that her brother worked for the Bureau of Prisons for the past five years. This witness was essential to the defense; that she was a nurse and her testimony as to the Petitioner's sanity immediately preceding the crime would have tended to corroborate the testimony of Pat Scott and contributed to a proper foundation for the psychiatric opinions of Dr. Waitzel and Dr. Glotfelty. It is further alleged that counsel for defense took all necessary steps to assure the presence of Marian Blake, who was expected to be an important witness. If the Government knew where she could be found and suppressed this information it amounted to the suppression of testimony in evidence in violation of the Sixth Amendment to the Constitution of the United States of America.

Because of the foregoing facts, Petitioner is being restrained of his liberty by the Respondent in violation of the Constitution of the United States, and he therefore prays that this motion be granted and an order entered vacating his sentence.

Dated: September 9, 1966

/s/ Harold Kaufman

/s/ A. H. Hamel

Attorney for Petitioner
HAROLD KAUFMAN
8000 Forsyth Blvd.
Clayton, Mo. 63105

[Jurat and Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 66 C 218(3)

HAROLD KAUFMAN, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

Great Britain and Northern Ireland)
London, England) SS.
Embassy of the United States of America)

AFFIDAVIT OF PATRICIA SCOTT

PATRICIA SCOTT, upon first being duly sworn, deposes and says as follows, to-wit:

1. That my present address is c/o Sweeney 37 C, Hermon Hill, Warmstead, London, E.11, England.
2. That if I am called to testify in the above-captioned proceeding I will testify:

(a) that prior to and during the course of trial Harold Kaufman was under serious emotional strain and was severely agitated, which increased in severity when Harold Kaufman learned that my children had been taken away from me and that I had been living with one Dillard Morrison;

(b) that certain evidence was not introduced during the course of trial which could have affected the jurors' findings, particularly that Harold Kaufman was addicted to cocaine and had a very low tolerance for narcotics and while under the influence of narcotics lost control of his actions;

(c) that I, together with Arthur Cooper, on or about December 14, 1963, cashed a Western Union money order to pay for the rental of the red Rambler automobile used by Harold Kaufman; and further, that Arthur Cooper authorized Harold Kaufman to

use the aforesaid automobile that he was driving at the time he was apprehended for the holdup of the Roosevelt Federal Savings and Loan Association on December 16, 1963;

(d) that I personally knew Marian Blake and I know that Marian Blake knew Harold Kaufman and that Marian Blake's testimony in Harold Kaufman's behalf was important and material to Harold Kaufman's defense of insanity by reason of her occupation as a nurse, and because she had an opportunity to observe Harold Kaufman prior to the commission of the aforesaid offense.

3. That if I am requested to appear as a witness in the above-captioned proceeding, I will appear voluntarily and voluntarily accept service of subpoena if the United States Government will pay the cost of my transportation, room and board to and from my present address in London, England. I do not have sufficient means to defray these costs on my own.

/s/ Patricia Scott
PATRICIA SCOTT

[Jurat Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

66C 218(3)

HAROLD KAUFMAN, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

MEMORANDUM OPINION AND ORDER—March 16, 1967

Petitioner, presently serving a sentence of 20 years imposed by this Court for armed robbery of a federally insured savings and loan association, seeks relief under § 2255, Title 28 U.S.C. A plenary hearing has been held on his original and supplemental motions to vacate the sentence and judgment, and the matter is now before the Court.

Kaufman's sole defense at his trial was insanity when the offense was committed. This issue was submitted to the jury under appropriate instructions. See *Kaufman v. United States*, 350 F.2d 408, for a resume of the trial evidence bearing on the issue of insanity.

The major issue on the instant motions is whether petitioner was incapable of cooperating fully with his counsel in preparing for trial and in the trial itself by reason of his alleged physical and emotional illness and his taking of drugs prior to, during, and subsequent to the trial. Based on this alleged inability to cooperate, petitioner now claims he was thereby deprived of the effective assistance of counsel.

The Court appointed counsel to assist petitioner on his § 2255 motion, and ordered that he be returned to St. Louis from the penitentiary at Atlanta to enable him to consult with his appointed counsel. Ample time thereafter was afforded petitioner and his counsel to prepare for the hearing. Subpoenas were issued at the govern-

ment's expense for the production of all records and documents requested by petitioner¹ and for certain witnesses.

On motion of petitioner, the Court appointed Doctor Paul T. Hartman, an expert in the field of psychiatry and neurology, for the purpose of evaluating the medical records and documents bearing upon the issue. Dr. Hartman had also examined petitioner prior to his trial, pursuant to an order obtained by petitioner, but petitioner did not permit him to testify at the trial.

Petitioner was apprehended in December, 1963, and shortly thereafter Mr. John Barsanti, Jr., a capable and experienced attorney (now president of the St. Louis Bar Association), was appointed to represent him. Mr. Barsanti, together with Mr. James W. Singer who was associated with him in the practice of law, entered their appearance for Kaufman, and both Mr. Barsanti and Mr. Singer thereafter represented Mr. Kaufman in preparing for the trial and in the trial itself.

Counsel properly filed a motion under 18 U.S.C., § 4244, for the determination of Kaufman's mental capacity, and the Court ordered him taken to the Medical Center at Springfield for examination. The diagnosis made at that institution was schizophrenic reaction, paranoid type, in partial, rather stable remission, but that Kaufman had a factual understanding of the proceedings against him and was able to assist rationally in his defense. On the basis of the report of that institution, the Court found Kaufman competent to stand trial.

¹ Subsequent to the submission of this case, Kaufman informed the Warden of the penitentiary that the records which had been forwarded to the Court in response to the subpoena did not include records of the Federal Detention Headquarters in New York City subsequent to his conviction and sentence. At his request and with the consent of the government's attorney, we obtained a copy of these records for the purpose of considering them in rendering our decision as fully as though they had been admitted in evidence. We now note that Kaufman was in error, since we find upon examination of the Court file that an identical copy of these records had in fact been included with the others forwarded by the Warden. However, neither this nor any other record of Kaufman's medical treatment subsequent to his conviction were offered in evidence.

While Kaufman was at the Springfield Medical Center, librium was regularly prescribed and administered to him. Librium is a tranquilizer, a drug commonly used for relief of symptoms of anxiety and tension. After he was returned to St. Louis in March 1964, and while confined in the St. Louis City Jail awaiting trial, Kaufman continued to take librium under prescription by the jail physician. This fact was disclosed at the trial by the warden of the Jail testifying on behalf of Kaufman. However there was not the slightest indication or contention at the time that Kaufman's use of librium affected to any extent whatsoever his ability to cooperate with and assist his counsel. In fact, Mr. Barsanti was of the opinion at the present hearing that it had no effect on Kaufman's ability to assist him at the trial.

The dosage which had been prescribed for Kaufman at the City Jail was 3 capsules daily of 5 mgm each. This is admittedly a very small amount, so much so that according to Kaufman, the prescribed dosage was insufficient to have any beneficial effect. His present story is that beginning in the latter part of March, instead of taking the librium "pills" as prescribed, and without the knowledge of anyone other than fellow prisoners, he would accumulate the capsules, and when he had saved some 10 or 15 he would distill them and inject them into his body by means of an eyedropper and syringe. In fact, his testimony was to the effect that he and other prisoners who were prescribed pills would use the pills in common.

Kaufman testified that each day during the trial, prior to leaving the jail for the court proceeding, he took 100 mgm of librium. His contention is that as a result of so doing, he was caused to become drowsy, sleepy and lackadaisical. In this connection, he swore that although he had discussed his case constantly (almost daily) with Mr. Singer and infrequently with Mr. Barsanti prior to trial, he did not, except on one occasion, say "one word" to his counsel during the trial itself, which lasted four days. On the other hand, Mr. Barsanti testified that he conferred with Mr. Kaufman at a number of court recesses as well as on at least two mornings before the trial proceedings resumed for the day. He was aware of the fact

that petitioner was taking librium, but since Kaufman's statements to him were consistent with the jail records it would appear that Kaufman made no disclosure of the fact, if so, that the quantity of librium actually taken by him was far in excess of what had been prescribed.

In any event, prior to the trial, Kaufman cooperated fully with his counsel and they were able to obtain from him all necessary material requested. At the trial Kaufman sat at the counsel table and there was nothing in his appearance which would indicate to his counsel (or to the Court for that matter) either drowsiness or a lack of awareness of the proceedings.

Dr. Hartman testified that a dosage of 100 mgm of librium is not uncommon and that its effect varies with the individual. He further testified that although such quantity would make a person drowsy, such drowsiness would be apparent to others, that is, the patient's head would droop, his eyelids close and he would doze. However, this state of drowsiness would last only 1 or 2 hours after the 100 mgm of librium were taken intravenously, and at the end of such period, the patient would return to a normal state of wakefulness.

It was Dr. Hartman's opinion that assuming Kaufman took the amount of librium he claimed, he would nevertheless be coherent, would understand the proceedings, and could communicate with counsel, and that his ability to assist counsel at his trial would not be impaired. The testimony of Mr. Barsanti corroborated Dr. Hartman's opinion. At all times, both before and during the trial, in the morning as in the afternoon, Kaufman gave no appearance of being drowsy. This Court personally observed Kaufman, and on occasion during recess talked with him, and in the judgment of the Court he was at all times alert, aware of what was transpiring, and capable of fully cooperating with and assisting his counsel.

Accepting, for the purpose of this motion, Kaufman's testimony that he accumulated the 5 mgm tablets of librium and that each morning during the trial, surreptitiously without the knowledge of his counsel, he took as much as 100 mgm of this drug mixed with other unknown drugs, we find and hold that the taking of said drugs did

not affect Kaufman's ability to cooperate with and assist his counsel either before or during the trial, nor did it affect his appearance and demeanor during the trial.

We further find and hold that neither the physical ailments for which Kaufman was treated before and after the trial, as shown by the records subpoenaed by him and his testimony at the hearing, nor his emotional or any other condition alleged in his motions rendered him incompetent to participate in his trial nor prevented him from fully cooperating with his counsel in the preparation and defense of the charge against him. Kaufman's counsel not only was able to but did in fact give him effective assistance.

The supplemental motion to vacate, prepared by appointed counsel, asserts as a further ground for relief that certain physical evidence was obtained by an allegedly unlawful search and seizure of Kaufman's automobile after his arrest. The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion. See *Warren v. United States*, 8 Cir., 311 F.2d 673, 675 (1963); *Springer v. United States*, 8 Cir., 340 F.2d 950 (1965).

The final ground set forth in the supplemental motion is a suggestion, but not a positive assertion, that the Government knew where Marian Blake, a witness whom Kaufman unsuccessfully tried to subpoena, could be found but failed to disclose this knowledge to the defense. The record shows that Marian Blake, a nurse, was one of a group of persons with whom Kaufman fraternized for a short period of time prior to his arrest. It is contended that her testimony would have tended to corroborate that of Patricia Scott concerning the alleged insanity or mental illness of Kaufman, and that because of her profession her testimony would have been of great value.

The record discloses that on May 15, 1964, Kaufman filed a motion requesting that Pat Scott, Marian Blake, and Detective Joseph Kiernan be subpoenaed at the expense of the government. The addresses of these three, all in New York, were set forth in an accompanying affi-

davit of Kaufman which stated in general terms, that "he expects said witnesses to testify as to facts and circumstances pertaining to his mental condition immediately prior to December 16, 1963, the date of the offense." Subsequently, Kaufman filed two other affidavits, dated May 28, 1964, outlining at greater length the testimony he expected to adduce from these witnesses. One affidavit pertained to Detective Kiernan and the other related to Pat Scott and Marian Balke collectively, and again the address of each was specifically set forth.

On June 9, 1964, the motion for issuance of subpoenas was sustained, and subpoenas issued. A number of other subpoenas were also requested, and the witnesses were ordered subpoenaed at the government's expense. The only witness, other than Dr. Fredericks, not ultimately found by a federal marshal was Marian Blake. The marshal in New York City made a non est return on the Marian Blake subpoena, which was filed in Court June 29, 1964, stating that the witness had moved from the address given without leaving a forwarding address. There is no evidence whatever that Kaufman made any further inquiries or attempted to find Marian Blake during the period of almost two months which followed the filing of the non est return. We note that the trial commenced August 24, 1964. It would appear to us that one or more of the other associates of Kaufman in New York would have known where Marian Blake could be found, if her presence were really necessary.

Petitioner does not claim that the marshal's return was false or made in bad faith, nor does he contend that the United States Attorney for this District or anyone in or connected with his office had any knowledge of Marian Blake's whereabouts or even that any of them had actual knowledge that a non est return had been filed. There is no charge that the local officials were requested to search for or to find the witness, nor is there the slightest intimation that Marian Blake was made unavailable to Kaufman through the procurement of the government. In short, there was no concealment or suppression of evidence. Cf. *Ferrari v. United States*, 9 Cir., 244 F.2d 132, 14-142.

The motion directed to this point simply states, "upon information and belief that one Richard Stein, United States Attorney, Southern District of Indiana, stated that Marian Blake's whereabouts were known and that her brother worked for the Bureau of Prisons for the past five years." Kaufman was subsequently tried and convicted in Indiana in the spring of 1966, a fact which appears from a letter motion which he filed in this Court under Rule 35. Whatever Stein may have said was undoubtedly in connection with that case and at a time subsequent to the trial in this district.

In any event, assuming that Mr. Stein made the statement attributed to him on information and belief, or even that it would have been possible for Mr. Stein to have located Marian Blake had he been requested to do so, we see no possible basis either in law or in fact for Kaufman's present contention that this information was suppressed by the government in violation of his constitutional rights. Kaufman makes no claim that Mr. Stein was aware in June or even in August, 1964, that a subpoena had been issued for Marian Blake and that a non est return had been made in the Eastern District of Missouri, nor that any knowledge Mr. Stein may have had in preparing the Indiana case for prosecution was communicated to the officials in this District. In these circumstances, whatever knowledge Mr. Stein may have had at some unspecified time as to the whereabouts of Marian Blake clearly cannot be imputed to the United States Attorney for the Eastern District of Missouri.

As stated supra, subpoenas were issued at the expense of the government, on petitioner's motion, for the appearance of certain witnesses, including the jail physician. The motion to subpoena other witnesses was denied, and we now reaffirm the propriety of that ruling as to each such witness.

(1) Dr. Ambellur Fredericks, a clinical psychologist, participated in an examination of petitioner in December, 1960, at the State Psychiatric Clinic in Jamestown, North Dakota, but has not seen or examined petitioner since then. Dr. Fredericks, now in Boston, Massachusetts, resigned from the Clinic in Jamestown in March, 1961.

Any testimony he might now give, relating to an examination over six years ago and some four years prior to petitioner's trial, would be entirely too remote, even if it were otherwise relevant. In this connection we note that Dr. I. David Waitzel, the psychiatrist director of the Clinic (under whom Dr. Fredericks administered his psychological evaluation of petitioner), testified at great length at the trial of this case on behalf of petitioner.

(2) Richard Stein, the U.S. Attorney for the Southern District of Indiana, was said by petitioner to have testified at a pre-trial hearing conducted in connection with the Indiana prosecution. Petitioner's affidavit recites that he "expected to prove by him that during the course of the trial the Government knew of the whereabouts of Marian Blake and could have produced her for trial if the Government had made a diligent effort to do so." For the reasons stated supra, such allegation even if it were sustained, would be insufficient to warrant the grant of the relief here prayed.

(3) Marian Blake's presence at the hearing was sought for the purpose of allegedly proving that had she testified at the trial she would have "corroborated" the trial testimony of Patricia Scott. In arriving at our decision, we have made such assumption. We also note that the address now given for Marian Blake is the very same address listed on the subpoena which was returned non est on June 15, 1964, with the notation that she "moved from the address over 2 mos. ago and left no forwarding address."

(4) Jerry Smith, then a fellow prisoner in the City Jail and now confined in the U. S. Penitentiary at Terre Haute, Indiana, is alleged to have witnessed petitioner's mental agitation at the City Jail and to be able to corroborate the claim that petitioner "took a medication by injections as well as orally." Parenthetically, we note that nothing in this affidavit gave any notice that Smith could corroborate the accumulation by petitioner of a number of 5 mgm of librium tablets, and that petitioner administered to himself as much as 100 mgm daily during the trial. In testifying at the hearing petitioner stated that he had met Smith about a week and a half before

trial, so obviously Smith could not have had any knowledge of what petitioner had done prior thereto. Petitioner further testified that other prisoners, including a Paul Hammer, participated with them in mixing, distilling and chewing drugs for self-administration. Yet petitioner sought only Smith's testimony, although presumably the other prisoners would have been more accessible to this Court. Under the circumstances, we were unwilling to order Smith's return from Terre Haute. In any event, to the extent that Smith could have corroborated petitioner's testimony, we have assumed such testimony to be true.

(5) The remaining witness whose personal presence was sought by petitioner is Patricia Scott, the same Patricia Scott for whom we had issued a writ of habeas corpus ad testificandum July 2, 1964, requiring her to be brought at the government's expense from a correctional institution in New York State where she was then serving a term for attempted burglary. Miss Scott, a woman of admittedly low morals, the mother of three children, each born out of wedlock by different fathers, testified at petitioner's trial. The record also shows that prior thereto, petitioner's counsel had consulted with and obtained information from her additional to that within the knowledge of Kaufman. We have been advised that Miss Scott has since been deported to England where she now resides. The record shows that petitioner proposed marriage to Miss Scott on the first occasion he met her (August, 1963), and he professes to love her and her illegitimate children. The record also shows that Miss Scott does not return this love, but is interested only in whatever money and other benefits she may derive from his illegal activities. That Miss Scott would welcome an all-expense paid trip from England to the United States is understandable. So, too, is petitioner's desire to bring her back and thereby enable him once again to see the woman he "loves." It is unlikely, under the record, that petitioner would have another such opportunity for many years to come, since he is under sentence not only in this Court and in the Southern District of Indiana, but is also still to serve a term of some 7½ to 10 years consecutive to the sentence im-

posed in this Court for an offense against the State of New York to which he pleaded guilty. In any event, we see nothing of value that Miss Scott could contribute to a proper decision of this matter, and we certainly do not intend to retry the original case in this proceeding.

Significantly, nothing in either Miss Scott's or petitioner's affidavit pertaining to her proposed testimony relates to the claimed effects of librium on petitioner. All that she would testify to, other than matters which bear only upon Kaufman's guilt of the offense of which he was convicted, is that "petitioner was under serious emotional strain and was severely agitated prior to and during the trial." Even so, the evidence at the instant hearing clearly demonstrates, and we have so found, that such alleged emotional strain and agitation did not affect Kaufman's ability to cooperate with and assist his counsel.

It is simply not true that petitioner's counsel received little or no cooperation in the preparation and defense of the case against him. The picture which Kaufman attempts to paint, and which we reject, is that he was listless and drowsy during the trial, so much so that it adversely affected his appearance to the jury as well as his ability to assist counsel. No corroborative evidence from any of the many other persons present at the trial was adduced at the hearing. On this vital issue there is only the self-serving testimony of Kaufman himself, which was completely lacking in specifics as to his actual appearance and the respects in which he allegedly could have but did not cooperate with and assist his experienced counsel.

Petitioner has failed to sustain his burden of proof. The motion to vacate the judgment and sentence is overruled. The foregoing memorandum constitutes our findings of fact and conclusions of law.

Dated this 16th day of March, 1967.

/s/ John K. Regan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 66C 218(3)

HAROLD KAUFMAN, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

ORDER—March 27, 1967

This matter is before the Court on motion of petitioner to appeal in forma pauperis from the Order of this Court dated March 16, 1967 overruling petitioner's supplemental motion to vacate judgment and sentence, and for leave to file notice of appeal in forma pauperis.

The memorandum opinion of this Court carefully considered each of the questions of law and fact raised by petitioner's motion to vacate. We note that petitioner's affidavit in support of his motion to appeal in forma pauperis does not state the nature of the appeal nor his belief that he is entitled to redress. In short, the affidavit fails to show what merit, if any, there is in the appeal. In our judgment the appeal in this case is frivolous and wholly without merit. For such reasons, we hereby certify that the appeal is not taken in good faith. The Motion to Appeal in Forma Pauperis should be and it is hereby denied, and leave to file Notice of Appeal in Forma Pauperis is hereby denied.

Dated this 27th day of March, 1967.

/s/ John K. Regan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1966

Misc. 461

Filed, May 11, 1967, Harold G. Pryce, Clerk,
U. S. District Court, E. Dist. of Mo., St. Louis

HAROLD KAUFMAN, PETITIONER

vs.

UNITED STATES OF AMERICA

ORDER

The Court has considered a motion for leave to proceed on appeal in forma pauperis, and in connection with that motion has examined the original files of the United States District Court for the Eastern District of Missouri.

Being fully advised in the premises, it is now here ordered that the motion for leave to proceed on appeal in forma pauperis be, and it is hereby, denied.

May 11, 1967

[Certificate of Clerk Omitted in Printing]

[A] EXCERPTS FROM THE TRIAL TRANSCRIPT
IN CASE No. 64 CR 12(3)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 64 Cr 12(3)

Filed, Nov. 10, 1964, Harold G. Pryce, Clerk,
U. S. District Court, E. Dist. of Mo., St. Louis

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HAROLD KAUFMAN, DEFENDANT

VOLUME I
TRANSCRIPT OF TRIAL

Transcript of testimony adduced and proceedings had during the trial of the above-styled cause on August 24, 25, 26 and 27, 1964, and after-trial motion of September 18, 1964, before

HONORABLE JOHN K. REGAN, JUDGE

presiding in Court No. 3 of the District Court of the United States, U. S. Court and Customs House, 1114 Market Street, St. Louis 1, Missouri, and a jury.

The defendant was present in person during all proceedings of the trial.

Appearances:

Mr. William C. Martin, Assistant United States Attorney.
Messrs. John Barsanti and James Singer, Attorneys for defendant.

* * * *

[1] OPENING STATEMENT IN BEHALF
OF THE GOVERNMENT

MR. MARTIN: May it please the Court, gentlemen of the defense, madam and gentlemen of the jury: During the course of the Court's Instructions this morning, he mentioned the fact that counsel for both sides would have the opportunity to give you the opening statement. As counsel for the government, it is my privilege to give you the first opening statement. The gentlemen for the defense will have the opportunity to give you the opening statement on behalf of the defendant. They might give [2] you their opening statement immediately after I have concluded, or they have the privilege of waiting until all of the government's evidence is in, and then give you their opening statement.

Now, in the opening statement I will be outlining to you the evidence which the government expects to bring before you, and you have been cautioned by the Court's instructions that what I might say in the opening statement or the closing argument, or any time during the course of the trial should not be taken as evidence, but it is my version of what the evidence is going to be in the opening statement, and in the closing statement what the evidence has been. Likewise, defense counsel the same caution applies to what they might say.

You have been informed that this is a criminal case brought by means of an indictment returned by the Grand Jury. Now, I will read to you the indictment, omitting the formal caption of the indictment, and also I will omit the formal closing of it, and just give you the body of the charge, which reads as follows:

"The Grand Jury charges:

"That on or about the 16th day of December, 1963, in St. Louis County, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, Harold Kaufman, the defendant, did, by force and vio- [3] lence, and by intimidation, take from the presence of another, to wit, Lloyd A. Woollen, Manager of the Roosevelt Federal Savings and Loan Association, certain money,

to wit, the sum of \$328.50, more or less, in lawful money of the United States, belonging to, and in the care, custody, control, management and possession of said Roosevelt Federal Savings and Loan Association, a Federal savings and loan association authorized and acting under the laws of the United States, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; that in committing the above offense, he, the said defendant, did put in jeopardy, the life of the said Lloyd A. Woollen by the use of a dangerous weapon and device."

That's the charge that has been brought by the Grand Jury, which the government will attempt to prove by the following evidence.

We will call first as a witness Mr. Allan H. Ramsey, who is the Vice-President of the Roosevelt Federal Savings and Loan Association. He will have with him the charter of the Roosevelt Federal Savings and Loan Association, and he will also have with him and also will identify the insurance certificate issued by the Federal Savings and Loan Insurance Corporation. That charter and the insurance certificate are both in effect now, and were in effect on December 16, 1963.

[4] The next witness that the government will call will be Mr. Lloyd A. Woollen. Mr. Woollen, on December 16, 1963, was the manager of the branch office of the Roosevelt Federal Savings and Loan Association located in the River Woods shopping area out in North St. Louis County.

THE COURT: River Roads.

MR. MARTIN: River Roads. Pardon me. That on December 16, at about 4:00 o'clock, shortly after 4:00 o'clock, the defendant, Harold Kaufman, entered into the office and engaged in conversation with Mrs. Marcelle Lorenz, who will also testify as a witness. Putting the testimony of these two witnesses together our evidence will show that the defendant talked with Mrs. Lorenz first, inquired about Travelers' Checks, inquired about the giving of a personal check in payment of Travelers' Checks, and that Mrs. Lorenz indicated that she could not accept the personal check in payment of Travelers' Checks; that the defendant then talked to Mr. Lloyd A. Woollen,

who was on duty at one of the tellers' windows, the window right next to the window where Mrs. Lorenz was working at the time.

Mr. Woollen had overheard the conversation between the defendant and Mrs. Lorenz, and the defendant then talked to Mr. Woollen. The nature of the conversation was in substance that the defendant was interested in a loan. He gave Mr. Woollen some information about him [5] that he had recently been transferred from Pittsburgh by his employer, the Western Electric Company, and that he was in the area, interested in a loan, and also there was a conversation about opening an account, and they were seated at this time at a desk in the Association office, and during the course of Mr. Woollen's taking information pertaining to the opening of a savings account, the defendant pulled a gun and announced that this was a holdup. We will have as an exhibit the pistol which the defendant was in possession of at that time.

We will bring to you testimony of witnesses who were in the savings and loan association during the course of the holdup. The defendant demanded money from Mr. Woollen, and Mr. Woollen then went to the teller's window, where he gave him, in substance, the sum of \$328.50 of the Association funds.

Now, Mr. Woollen, at the time he gave this money to the defendant, gave him what might be referred to in the testimony as bait money, and our evidence will show that previously Mr. Woollen, together with another employee, had written down serial numbers of \$50.00 of the money which was given to the defendant during the course of this robbery.

Our evidence will show that subsequently this same money delivered by Mr. Woollen to the defendant was recovered from the possession of the defendant.

[6] Not only did the defendant demand money, but he also asked for Travelers' Checks and we will have as an exhibit two folders containing Travelers' Checks, together with other documents from the Roosevelt Federal Savings and Loan Association, which were delivered over to the defendant.

Mr. Woolleñ will testify further that after the robbery he made an inventory of the cash drawer from which he took the money and delivered to the defendant, and there was missing from the cash drawer \$328.50.

His testimony will be further that he subsequently checked the records of the Association, and he was able to determine the serial numbers of the Travelers' Checks that were missing, and that there was a total of approximately \$11,520 worth of Travelers' Checks which had been delivered over to the defendant.

Our evidence will show that subsequent to the defendant's apprehension he was found in possession of these two folders of Travelers' Checks in the amount of approximately \$11,520.

Now, during the course of the holdup some customers came into the Association office, and we will have one customer, Mr. John Dedert, as a witness, and he will testify that he, his wife, and family of three children entered the Association offices during the course of the holdup; that he and some other customers were directed [7] to the back room, where they went to, a back office; that they were directed to go there by the defendant. They remained in this office for a few minutes, and the defendant then directed them to go into the back room, or supply room of the Association office, and that they remained there until the defendant left.

The evidence will show that after the defendant left the Roosevelt Federal Savings and Loan Association in North St. Louis County, he proceeded directly to Alton, Illinois, and that when he crossed the bridge at Alton, Illinois, there was a car, if you will, of the Alton Police Department, occupied by a man by the name of Stahl. Corporal Stahl's testimony will be that he received a message from his dispatcher to look out for a hit and run driver that was driving a 1954 red Rambler bearing New York license plates 1963 8Z6367; that he was in the vicinity of the Lewis & Clark Bridge as you enter into Alton, Illinois, from across the river, and that he saw this automobile come across the bridge, and that he immediately started to follow the automobile. This automobile traveled some distance and made a turn, at which

place it went out of control, hit a tree, and was unable to proceed farther.

Corporal Stahl then approached the defendant, conversed with him about the accident, and subsequently placed him under arrest because of the accident at that time.

[8] A tow truck was called, and we will have as a witness a gentleman by the name of Clifford Martin, who operates Cliff's Towing Service in Alton, Illinois. Mr. Cliff Martin towed the wrecked automobile away from the scene of the accident to his garage, and after he arrived at the garage he discovered in the automobile on the back seat a .38 caliber revolver, and our evidence will show that this revolver was a Smith & Wesson, Serial number 287393, I believe the number to be.

The defendant was taken to the police station by Corporal Stahl, where he was searched by a Sergeant by the name of Light, and Sgt. Light will appear and testify as a witness.

On duty at the time at the Alton Police Station was Captain Petersen, and Captain Petersen will also appear and testify. Sgt. Light will give his testimony as to the items found in the possession of the defendant at the time of his arrest and search there in the police station, and Captain Petersen will have the records of the Police Department as to the items recovered from the defendant at that time.

Further, our evidence will show that an investigation of the automobile subsequent to the accident disclosed a number of articles which we will have before you and introduce into evidence, and during the course of the [9] search of the automobile and the course of the search of the defendant, the \$328.50, which he had taken from the Roosevelt Federal Savings and Loan Association, were found, the pistol was found, the folders containing \$11,520 worth of Travelers' Checks were found, along with a number of other personal items.

Our evidence further will show that the defendant is from New York City, and that prior to leaving New York City he had conceived the idea of coming to St. Louis for the purpose of committing a robbery.

Our evidence will show that among the items recovered from the possession of the defendant and in the automobile was a rental contract from an automobile agency located in New York City; that this agency had on or about, I believe the date to be December 13 or 14, rented to Arthur Cooper this particular automobile.

Our evidence will show that the defendant, after arriving in Alton, Illinois, from New York City on December 16, he stopped at Wittel's Gun Shop in Alton, Illinois, and that approximately 1:55 P.M. on December 16 he purchased this particular gun from Wittel's Gun Shop in Alton, Illinois, and we will have the records of the gun shop which shows a sale of the pistol to the defendant, at which time he used the name of Arthur Cooper in purchasing the pistol. We will have the gentleman, Mr. John [10] Davis, from the gun shop in Alton, Illinois, who talked with the defendant, made the sale, will identify the records of the gun shop, together with the pistol which was sold to the defendant at 1:55 P.M. on December 16th. And Mr. Woollen's testimony will be that approximately 4:05 that same date the defendant entered the Roosevelt Federal Savings and Loan Association and proceeded to commit the robbery.

Furthermore, we will show to you that the defendant, in planning the perpetration of this particular robbery, came over from Alton, Illinois, he went to the River Roads Shopping Center and looked at the Roosevelt Savings and Loan Association. He went to the Northland Shopping Center, and looked at the Federal Savings and Loan Association there, and determined that the Roosevelt would be the easier one to rob.

Now, ladies and gentlemen, some of this evidence will be contained in a statement which was subsequently signed by the defendant.

MR. BARSANTI: Your Honor, if I might object at this point, any reference to the statement Mr. Martin is about to make, we will move to exclude that when the time comes, and I will object to any reference to it at this time.

THE COURT: Come up a minute.

(Thereupon, a colloquy ensued among the Court and counsel, out of the hearing of the jury, and off the record.)

THE COURT: I will sustain the objection at this [11] time.

MR. MARTIN: Now, I have not attempted to give you each and every bit of evidence which the government will bring before you, but we will bring before you evidence to prove each element contained in the charge in the indictment. I have merely attempted to give you a general outline of what we anticipate our evidence to be. You will hear the evidence, and I will not take any more of your time. I will not try to go any more into detail, but thank you for your attention so far.

MR. BARSANTI: Your Honor, with your leave, we will make our statement now.

THE COURT: All right.

OPENING STATEMENT IN BEHALF OF THE DEFENDANT

MR. BARSANTI: If the Court please, Mr. Martin, Mrs. Goodhead, gentlemen of the jury: You have heard the statement of Mr. Martin on behalf of the government as to what they intend to prove to you today. In the course of this trial, the evidence for the defendant, Harold Kaufman, will be that on December 16, 1963, the man was mentally ill, mentally sick, to the point that he was not able to control his actions, whether they be right or wrong. Any actions taken were not those of a rational man, were not those of a sane man. The evidence which the government will present will show that a physical body bodied [12] in the body of Harold Kaufman entered the Roosevelt Federal Savings and Loan Association, that had a gun, and removed from that institution property as described to you, checks and cash. But the government in its evidence to you will not be able to prove beyond a reasonable doubt that that was a sane man that performed those actions.

Our evidence will show that this approximately 40-year old man has been mentally sick for many years, of dif-

ferent severity at different times, probably existing from childhood. He will be diagnosed for you as suffering from a schizophrenic reaction, paranoid type. Our evidence will show to you that this is a man who when subjected to pressures, whether they be real or imaginary, when experiencing frustrations, whether real or imaginary, the normal human mechanism, the normal mental mechanism is not there which each of you have to keep yourself under control.

Our evidence will show that when such an ailment exists, pressures and frustrations, which will be brought forth to you in the evidence that were affecting this man, can bring him to the point where there is no mind, no independent will, no way to control the action.

Now, all of us are experienced in seeing this happen on a very temporary basis. Even normal people have momentary fits of anger where they lose their control, but you all have the normal mind, the normal human mechanisms which immediately bring you back, which restore you.

The evidence will show that the sickness which Mr. Kaufman has destroys these normal mechanisms. The ability to restore and regain normalcy is not possible. To return to realism is almost impossible. We will show you that in Harold Kaufman these normal mechanisms are not there.

Our evidence will show that on December 16, 1963, because of the mental illness, Harold Kaufman was out of touch with what we know as reality. He was sick and unable to control his actions.

Now, our evidence will be presented to you through several lay witnesses and several psychiatrists. One of the lay witnesses will be a detective from the New York Police Department, which is where Mr. Kaufman lived when he was not in an institution, not in jail or some place. He will be introduced to you through a woman with whom he had close contact during the months preceding December 16, 1963, a woman who is presently serving a term in prison in the State of New York for burglary, a woman who had three illegitimate children, two of them by, I believe, by a Negro father, one by a white father.

The psychiatrist who will be here will be one who employed Harold Kaufman some time prior to December 16, 1963, actually several years, at a time when his condition was still on the neurotic borderline side of sanity and [14] had not crossed into the psychotic level.

The other psychiatrists will be psychiatrists who were employed by the United States Government, who examined Mr. Kaufman after the event. The testimony that will be presented through these doctors will show the logical and unfortunately natural sequence and breakdown of Mr. Kaufman's mental capacity and ability. This testimony will connect up the pressures, frustrations, anxieties, the nervousness which will be shown to you in the months preceding this event, to show that on December 16 there was no mental capacity; that this man was legally insane.

Now, the evidence will also show that this is not a matter of suddenly going berserk, in the picture that many see of someone climbing a wall. It is not something that is necessarily turned on, and although it might be, some people are restored to control. Some people never are restored to control.

The evidence will not show that Harold Kaufman today is a normal human being. It will show that he has been brought back to some closer touch to reality. It will not show that he is a well man, but the evidence as a whole will show, without a doubt, that he was a sick man, certainly to the point that it will be impossible for the government to prove beyond a reasonable doubt that he was sane on December 16th. Thank you.

* * *

[23] LLOYD WOOLLEN,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q Will you state your name, please, sir?

A Lloyd Woollen.

THE COURT: Spell that last name.

THE WITNESS: W-o-o-l-l-e-n.

Q (By Mr. Martin) What is your business or occupation, Mr. Woollen?

A I am River Roads Branch Manager of the Roosevelt Federal Savings and Loan Association.

Q Calling your attention to the date of December 16, 1963, were you working for the Roosevelt Federal Savings and Loan Association on that date?

A Yes, sir.

Q At what office, sir?

A River Roads.

Q Will you tell us where that is located?

[24] A It is located at 104 River Roads Center, Jennings, Missouri.

Q Thank you, sir. Was there anyone else working on that date?

A Yes, sir.

Q Who else?

A Mrs. Marcelle Lorenz.

Q Have you ever seen the defendant, Harold Kaufman, before?

A Yes, sir.

Q Do you see him in the courtroom today, sir?

A Yes, sir.

Q Will you point him out to us, please, sir?

A Yes, sir; the man right there (indicating).

THE COURT: Where?

THE WITNESS: The third man from me.

THE COURT: Which side of counsel table?

THE WITNESS: My left.

THE COURT: All right.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: The record will so show.

Q (By Mr. Martin) Did you see him on December 16 of 1963?

[25] A Yes, sir.

Q About what time, sir?

A Approximately 4:00 o'clock.

Q And where did you see him?

A In our office at River Roads.

Q Did you see him when he entered?

A Yes, sir.

Q Was anyone with him?

A No, sir.

Q Was anyone in the office, other than you and Mrs. Lorenz?

A No.

Q What was the first thing that Mr. Kaufman did after he came into the Association office?

A He approached Mrs. Lorenz inquiring about purchasing Travelers' Checks.

* * * *

[26] Q (By Mr. Martin) Now, did you talk to the defendant on that date, sir?

[27] A Yes, sir.

Q About how long did you talk to him?

A Nearly ten minutes; eight to ten minutes.

Q Now, will you tell us what was the conversation that you had with the defendant during that period of time?

A I talked with him concerning a G.I. loan, a Veterans Administration loan.

Q What, if anything, did he say about a G.I. loan?

MR. BARSANTI: I object, Your Honor, as being leading and immaterial to any matter before the Court.

THE COURT: It will be overruled.

MR. MARTIN: You may answer, sir.

THE WITNESS: I inquired whether he could even get a G.I. loan or not in this vicinity. He told me that he was being transferred to St. Louis from out of town, and we spoke about general information concerning a G.I. loan. He told me that he had a certificate of eligibility, which is necessary for the obtaining of a G.I. loan. He told me he had this, and we spoke just general information about a G.I. loan.

Q Did he give you the name of his alleged employer?

A Yes, sir.

Q What name did he give you as his employer?

A Western Electric.

Q Did he tell you from where he had been transferred?

[28] A Yes, sir. I believe it was Indianapolis.

Q Now, sir, did you have any additional conversation pertaining to the opening of a savings account?

A Yes. After we talked about the G.I. loan for several minutes, he informed me that since he was new in town, of course he eventually wanted to open banking connections, and he said, "While I am here, let's just open a savings account," so we proceeded to do that.

Q Now, sir, when you first talked to him, where was that conversation?

A Concerning the savings account?

Q Concerning the loan.

A The loan was at the vicinity of Teller Window 1.

Q When you talked to him about the savings account, where was that conversation?

A When he first had mentioned that he of course wanted to open a savings account, it was in the same vicinity. As soon as he mentioned that he wished to open a savings account, we sat down at the New Accounts desk, which is approximately five or six feet from there.

Q Did you know where Mr. Lorenz was at that time, sir?

A As far as I can remember, she was still within her vicinity of Teller Window 2.

Q Did you proceed to go through the formality of asking questions about the savings account?

A Yes, sir.

Q Now, sir, during the course of that conversation about opening the savings account, what, if anything, did the defendant do?

A Well, of course, the first thing I asked him was his name and address here in the city. He gave this to me, and while doing this he had laid a five dollar bill on the counter. Nothing was indicated that this was to be the amount of the account. He just had laid it there, I assumed in preparation for the opening of the account.

Q Now, sir, up to that time had you had the opportunity to observe the manner of the defendant?

A Yes, sir.

Q Will you describe that for us, sir?

A Describe how I happened to observe him?

Q What did you observe?

A What did I observe?

Q Yes, sir.

A Well, of course, the time I was talking to him about a loan was eight to ten minutes, and we were within probably four feet of each other at that time, and, of course, I observed his appearance, his hat, his dress, and so forth.

* * * *

[31] Q Now, sir, what happened while you were talking to him about opening the savings account?

A Well, he gave me a name and an address, and I proceeded to seek from him his Social Security number, and after he gave me some numbers, he sort of hesitated as to the last four numbers, acted as if he couldn't remember, or something of that nature, and I indicated to him that it was a new law that we do have to at least attempt to obtain a Social Security number and at that point he proceeded to pull the gun on me.

(Thereupon, a list of serial numbers of bills was marked by the reporter as Government's Exhibit No. 3 for the purpose of identification.

A list of Travelers' Checks was marked as Government's Exhibit No. 4 for the purpose of identification.

An expansion envelope containing Travelers' Checks was marked as Government's Exhibit No. 5-A for the purpose of identification.

An expansion envelope containing Travelers' Checks was marked as Government's Exhibit No. 5-B for the purpose of identification.

[32] A revolver was marked as Government's Exhibit No. 6 for the purpose of identification.)

Q (By Mr. Martin) Now, Mr. Woollen, I think you said that the defendant pulled a gun out?

A Yes, sir.

Q Were you able to see the gun?

A Yes, sir.

Q Now, sir, I will show you a Smith & Weston revolver—that is Wesson, not Weston—marked Government's Exhibit No. 6, bearing Serial Number 287393. Will you look at that, please, sir, Mr. Woollen?

A This appears to be a gun similar, if not like the same one he showed me.

MR. MARTIN: I don't know if the gentleman sitting over there in the last chair heard you or not, sir. Will you repeat that answer?

A I said it is a gun that appears similar, if not just exactly like the one he pulled on me.

Q What, if anything, did the defendant say at the time he pulled a gun that appears to be similar to Government's Exhibit No. 6?

A What did he say when he pulled the gun?

Q Yes, sir.

A He said, "This is a stick-up," to me. He said, [33] "This is a stick-up."

Q And what, if anything, did you do at that time?

A At that time, I was seated at the desk, and I pushed my chair back somewhat a few inches from the desk to show that I was not doing anything to touch an alarm or anything of that nature, to him.

Q After you did that, did he say anything else to you, sir?

A He said something else, before he said anything else to me, again to Mrs. Lorenz.

Q What, if anything, did he say to Mrs. Lorenz?

A He said, "Lady, don't touch anything or I'll blow your head off," or something of that nature.

Q Now, sir, was the gun pointed at you?

A No, sir, he didn't point the gun at me. The counter top is ordinary desk level. He pulled the gun out, and he showed me the gun. He had it above the counter but it wasn't exactly pointing at me. He showed me the gun, saying, "This is a stick-up".

Q Now, sir, at that time was the defendant's hand shaking or was it steady?

A I didn't see if it was shaking; no, sir.

Q Now, what was the next thing you did, sir?

A The next thing he said to me was, "Give me your
[34] cash and all your Travelers' Checks."

Q Did you give him any cash, sir?

A Yes, sir, I did.

Q Did you give him any Travelers' Checks, sir?

A Yes, sir.

Q And after you gave him the cash and Travelers' Checks, what, if anything, did he do or say?

A Well, I put the cash and Travelers' Checks on Counter Window No. 1. He took them from the counter and stuffed them into an overcoat pocket, an overcoat which he had on. I should say he stuck the cash in the pockets. The Travelers' Checks were in large packets, and those he just put under his arm, or held them in some such nature.

Q Now, sir, did anyone else enter the office of the Roosevelt Federal Savings and Loan Association while these events were occurring?

A Yes, sir.

Q Do you know who else entered?

A There was a lady. A lady first entered. I don't know her by name. I can't give you her name. A Mr. and Mrs. Dedert entered later with their three children.

Q What happened after Mr. and Mrs. Dedert entered with their three children?

A At that time, he ordered them back into my office, [35] which is in the rear of the office, office proper, and had them sit down into my office. He later on moved them from that office into a storage area.

* * * * *

[36] Q And what, if anything, did the defendant say during that period of time?

A At that time he ushered them back into my office, and then he came back out of the office, and that is when he stuffed the cash into his pockets, and then at that time he went back to my office again and told them to come out of my office, and ushered them then back into the storage area.

Q Where is the storage area located?

A That is located at the rear of the teller section, at the back portion of the office, completely in the back.

Q Did you hear the defendant say anything about the children?

A Yes. He mentioned at least two times that I can recall, he said something to this effect: "Everybody do as [37] I tell you. I don't want to have to hurt the kids. I don't want to hurt the children."

* * * *

Q Mr. Woollen, you subsequently made an inventory of the cash drawer from which you took the cash which you gave the defendant?

A Yes, sir.

Q You made that inventory yourself?

A Yes, sir.

Q Were you able to determine how much cash was missing from the drawer?

A Yes, sir.

Q Will you tell us how much was missing?

A Three hundred twenty-eight dollars and fifty cents.

[38] Q Sir, did you subsequently examine the records of the Roosevelt Federal Savings and Loan Association, the River Roads Branch, pertaining to Travelers' Checks that you had on hand?

A Yes, sir.

Q Were you able to determine how much Travelers' Checks had been missing?

A Yes, sir.

Q Will you tell us the total amount that you recall?

A The total amount dollar-wise, \$11,520.

Q Now, sir, I will give you a list, which is Exhibit No. 4, and ask you if you recognize that list?

A Yes, sir.

Q Will you tell us what that is?

A This is a list that I compiled from the Association's records determining the account numbers, the amount of the checks denomination-wise, and the total dollar amount.

THE COURT: Talk a little louder, will you, please? This is of the Travelers' Checks; is that right?

THE WITNESS: Yes, sir.

Q (By Mr. Martin) And, sir, I believe you said this is a list of the Travelers' Checks that were missing after the defendant left?

A Yes, sir.

[39] Q Now, sir, I will show you two folders containing Travelers' Checks. These two folders containing Travelers' Checks are marked Government's Exhibits 5-A and 5-B. Will you examine those, please, Mr. Woollen?

A Shall I open them.

Q Yes, sir. Now, sir, will you tell us what you find in those two folders?

A These are the two packets by which we maintained our supply of Travelers' Checks at the River Roads Branch.

Q What company issues those Travelers' Checks?

A American Express.

Q And do you see any other documents in those two folders?

A Yes. I see a booklet in the folder by which we maintain a balance of how many Travelers' Checks we still have on hand in the Association.

Q Now, those Travelers' Checks are in sort of book form, or how are they?

A Yes, sir.

Q And they have serial numbers on them?

A Yes, sir.

Q And, sir, those serial numbers are the ones listed on this Exhibit No. 4?

A Yes, sir.

[40] Q And do you recognize the Exhibit 5-A and 5-B as being the two folders that you gave to Mr. Kaufman on December 16, 1963?

A Yes, sir.

Q Sir, I will show you a list which is marked as Government's Exhibit No. 3. Will you tell us what that is, sir?

A This is a list showing a recording of certain serial numbers on one dollar bills which we had placed into Drawer No. 2 at the River Roads Shopping Center.

Q What is the date of that list, sir?

A July 19, 1962.

Q And that list contained serial numbers of what denomination of bills?

A One dollar bills.

Q That is United States currency?

A Yes, sir.

Q Will you tell us who made up that list, sir?

A This list was made up by myself and Adele Frederick.

Q Does it bear your signature?

A Yes, sir.

Q Now, sir, after you wrote the list of serial numbers that appear there, what, if anything, did you do with the bills bearing those serial numbers?

[41] A I verified that the list was made correctly by taking each bill in turn and checking it directly against the numbers that are recorded on this paper here.

Q And after you had completed that procedure, what, if anything, did you do with the bundle of bills?

A The bills were then bundled with a rubber band and placed in the drawer.

Q And when you say "in the drawer," would that be in the cash drawer of Window No. 1?

A Yes, sir.

Q And that is the drawer from which you took the cash which you gave to Mr. Kaufman on December 16, 1963?

A Yes, sir.

Q Now, sir, did I ask you the amount of money or bills represented by that list of serial numbers?

A Fifty dollars.

Q And all one dollar bills?

A Yes, sir.

Q What, if anything, did you do with those fifty one-dollar bills, the serial numbers of which are listed on that list?

A These were contained in the money that I gave to the defendant.

MR. MARTIN: Thank you, sir.

[42] THE COURT: You made up that list. When did you make it up?

THE WITNESS: July 19, 1962.

THE COURT: Did you keep putting that money back every day or how did you happen to have that same money?

THE WITNESS: This stays in each drawer.

THE COURT: What?

THE WITNESS: This stays in the drawer. It never is taken out.

THE COURT: I see.

Q (By Mr. Martin) Sir, from December 19, 1962, the date that you made up the list,—I mean from, did I say—I mean from July 19, 1962, until December 16 of 1963, the bills represented by the serial numbers on this list were contained and remained in drawer No. 1.

A Drawer No. 2 at Window No. 1.

MR. MARTIN: Oh, pardon me, sir. If the Court please, I'd like to offer into evidence Exhibits 3, 4, 5-A and 5-B.

MR. BARSANTI: 3, 4, 5-A and 5-B? Is that correct?

THE COURT: What about 6? It hasn't been identified.

MR. MARTIN: I am not offering 6 as of this time, Your Honor.

THE COURT: All right. They will be received.

[43] MR. BARSANTI: No objection, Your Honor.

(Whereupon, Government's Exhibits Nos. 3, 4, 5-A and 5-B were received in evidence.)

* * * *

[45] MARCELLE LORENZ,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

* * * *

Q (By Mr. Martin) What is your business or occupation, Mrs. Lorenz?

A Assistant Manager for Roosevelt Federal Savings and Loan.

THE COURT: Talk a little louder, please.

THE WITNESS: Assistant Manager for Roosevelt Federal.

[46] Q (By Mr. Martin) At which branch?

A River Roads.

Q That is the one in Jennings, Missouri?

A That's right.

Q Were you working at that office, branch office in Jennings, the Roosevelt Federal Savings and Loan Association, on December 16, 1963?

A I was.

Q On that date, did you see Mr. Harold Kaufman, the defendant in this case?

A I did.

Q Do you see him in the courtroom?

A Yes, sir.

Q Will you point him out to us, please, ma'am?

A Right to your right.

Q That would be this third gentleman on the right-hand side of the table?

A Yes, sir.

* * * * *

[48] Q Now, did you see Mr. Woollen giving to the defendant any money?

A Yes.

Q Immediately prior to Mr. Woollen's giving to the defendant any money, did the defendant say anything to you?

A Yes. He warned me not to press any buzzer or anything, or alarm, rather, or he'd blow my head off. That was his words.

* * * * *

[50] JOHN DEDERT,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

[51] Q Now, sir, calling your attention to the date of December 16, 1963, did you have occasion to be in the office of the Roosevelt Federal Savings and Loan Association at River Roads Branch?

A I was.

Q At that time, sir, was there anyone with you?

A My wife and three kids.

Q At that time, sir, did you see Mr. Harold Kaufman, the defendant in this case?

A I did.

Q And do you see him in the courtroom today, sir?

A I do.

Q Will you point him out to me, sir?

A The man sitting on the far side.

Q That would be the third gentlemen?

A The third gentleman down.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: The record will so show.

Q (By Mr. Martin) Where was Mr. Kaufman when you first saw him, sir?

A He was scooping money into one hand, and sticking the money in his pocket with the other hand. He was in the bank.

[53]

JOHN E. DAVIS,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

(Thereupon, a card was marked by the reporter as Government's Exhibit No. 7 for the purpose of identification.)

Q Will you state your name, please, sir?

A John E. Davis.

Q What is your business or occupation, Mr. Davis?

[54] A Manager of Wittel's Gun Shop, Alton, Illinois.

Q Were you employed at Wittel's Gun Shop on December 16, 1963?

A Yes, sir.

Q Will you give us the address of that gun shop?

A 204 State.

Q That is Alton, Illinois?

A Yes, sir.

Q Now, sir, on that date, did you see the defendant, Mr. Harold Kaufman?

A Yes, I did.

Q Do you see him in the courtroom, sir?

A Yes.

Q Will you point him out to us, please, sir?

A The third fellow on this end, on my right.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: It will so show.

Q (By Mr. Martin) Did you have a conversation with him, sir?

A Yes, I did.

Q Was there anyone else present at the time you had a conversation with him on that date?

A Not that I recall; no. They was in and out of the [55] shop, but I wouldn't know exactly who it would be.

Q And what was that conversation about?

A Mr. Kaufman come in, which was known as Cooper at the time, and wanted to buy a target pistol. Well, we didn't have a target pistol at the time, so he decided to buy a .38, that is a S&W Victory Model. Finally, he decided on that, said he'd have to make a phone call before he'd buy the pistol. I said, "Well, if it's anything pertaining to your wife about buying the pistol, you are welcome to use our phones."

"No," he said, "It would have to be private." So he was gone, and maybe thirty-five or forty minutes later he come back and bought the pistol.

Q Now, sir, did he tell you the purpose of buying that pistol?

A He said he wanted to buy it for his son up in Chanute Field for a Christmas present.

Q Sir, about how long did you talk to Mr. Kaufman when he was in the store the first time?

A Oh, I imagine twenty, twenty-five minutes. I'll say less than a half an hour.

Q And were you able to observe whether or not his conversation was coherent?

A He talked very normal.

[56] Q And were you able to observe his nervous condition at that time, sir?

A No, I couldn't.

Q Did he appear to you to be nervous, or not to be nervous?

A Well, he appeared to me not to be nervous.

Q Were you able to observe whether or not he appeared to be agitated?

A No.

Q You weren't able to observe, or he was not?

A Well, I couldn't—No, I don't know if he—Will you state your question again?

THE COURT: Would you state whether or not he appeared to be agitated.

THE WITNESS: No, he didn't seem that way to me.

Q (By Mr. Martin) Now, sir, did you sell him a pistol?

A Yes, I did.

Q I will show you Government's Exhibit 6, which is a Smith & Wesson revolver, Serial Number 287393, and ask you whether or not you recognize it, sir?

A This is the pistol. This is the one.

Q That is the one that you sold to Mr. Kaufman?

A Yes.

Q At that time, you knew him as Arthur Coleman—
[57] Cooper?

[61] CHARLES B. STAHL,

being duly sworn testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir?

A Charles B. Stahl.

Q And what is your business or occupation, Mr. Stahl?

A Police officer, Alton Police Department.

Q And what is your rank?

A Corporal.

Q In the Alton Police Department?

A Corporal.

Q Sir, were you so employed on December 16, 1963?

A I was.

Q Were you on duty that day?

A I was.

Q Calling your attention to about 4:40 P.M. on December 16, 1963, did you receive a message from your dispatcher?

A I did.

Q What was that message, sir?

A To proceed to the bridge entrance and stand by to

4 Pages 62 through 71 inadvertently omitted in page numbering.

[72] watch for an automobile coming, possibly coming across the bridge from the Missouri side, that had been involved in a hit-and-run accident.

Q What description did you have of that automobile?

A '63 red Rambler.

Q What license plates?

A New York license.

Q And do you recall the number of the license plates?

A I have it in my notes.

Q Will you tell us what the license plate number was?

A 8Z6367.

Q And, sir, did you subsequently see a red Rambler bearing a New York license plate 8Z6367 come across the bridge, or in Alton, Illinois?

A I did.

Q Do you recall about what time you saw that automobile?

A Around 4:40 P.M.

Q Did you follow the car?

A I did; yes, sir.

Q Did you signal for the automobile to stop, or attempt to stop it?

A I did.

Q Will you tell us what happened when you did signal for the automobile to stop?

[73] A I rushed, turned a red light on the cruiser, honked the horn, and motioned for the man to pull over to the curb. He immediately made a right turn attempting to go up a hill on George Street off of Third, and when he did, he slipped on the ice, went up over the curb, drove up over the sidewalk until he hit a tree, killed the engine of his automobile, and the car rolled back across the street.

Q Did you subsequently see the driver of that automobile?

A Sir?

Q Did you see the driver of that automobile?

A Yes, sir.

Q Did you determine who the driver was?

A At the time I did not know him; no, sir.

Q Did you subsequently learn who he was?

A Yes, sir.

Q And who was the driver of that automobile?

A Harold Kaufman.

Q At the time that you first talked to the driver of the automobile, what, if anything, did he give you at that time?

A He gave me a name of Taylor. I have it here, (referring to notes), Donald Harry Taylor.

Q Now, sir, do you see the driver of that automobile [74] in the courtroom?

A Yes, sir.

Q Will you point him out to us, please, sir?

A The gentleman there (indicating).

MR. MARTIN: If the Court please, may the record show the witness has indicated the defendant, Harold Kaufman?

THE COURT: The record will so show.

Q (By Mr. Martin) Immediately after the accident, did you have any conversation with the driver of that automobile, Harold Kaufman?

A We talked on the street. I arrested him for traffic violation at the time, and we talked on the street, or in the police cruiser, and I asked him what was the matter. He had had an accident in Missouri, and now he had one in Illinois, and what was the matter, and had he been drinking, and he said yes, he was drunk. And I told the man he had driven his car then as far as I could allow him to drive it at that time, because he had already been involved in two accidents, and I placed him under arrest for traffic violation and called for a wrecker to tow his automobile.

Q Now, sir, were you close enough to Mr. Kaufman at the time you were having that conversation to determine whether or not there was an odor of alcohol on him?

A He didn't appear to have been intoxicated to me.

[75] Q He did not appear to have been intoxicated?

A No, sir.

Q Did you subsequently take him to the Alton Police Station?

A Yes, sir.

Q After you arrived at the Alton Police Station, did you have a conversation with him there?

A I did.

MR. BARSANTI: If the Court please, before any further questions along this line, I will object to any further conversation, testimony about conversation with the defendant at this time.

THE COURT: Unless we have a voir dire hearing, I will sustain the present objection.

Q (By Mr. Martin) Now, sir, at the time you took him to the Alton Police Station and had the conversation with him, who, if anyone, was present?

A Sgt. Light and Capt., Petersen were there. Lt. Schmidt was also present.

Q Do you recall approximately what time that was?

A About, I would say about that time it was about 4:45. At the time of my arrest it was 4:40, on the street. When I stopped him and arrested him on the street, it was 4:40 then. Approximately 4:45.

[76] Q Now, sir, did you learn of the existence of a gun in the automobile which had been in the accident?

A Sir?

Q Did you learn of the existence of a gun in the automobile?

A I did; yes, sir.

Q Who, if anyone, told you about that?

A Cliff Martin.

MR. BARSANTI: I will object who told the officer about something.

THE COURT: I think that would be hearsay, Mr. Martin.

Q (By Mr. Martin) Did you have a conversation with Mr. Kaufman at the time about a gun in the automobile?

MR. BARSANTI: I will object to any such conversations with Mr. Kaufman, anything Mr. Kaufman may have said, without some foundation.

THE COURT: The question was did he have a conversation about it. I think he can answer that without answering what Mr. Kaufman said.

MR. BARSANTI: Well, Your Honor, if the discussion relates to subject matter there, it has to be assumed there was some discussion by both parties.

THE COURT: If you are going into this, Mr. Barsanti, we might as well excuse the jury and go into it, [77] or just abandon it, one or the other. I don't care what you do.

MR. MARTIN: If the Court wants to excuse the jury, I can give the Court the reasons why I think it is admissible.

THE COURT: All right. The jury will step out, please. Court will remain in session.

(Thereupon, the jury left the courtroom, and the further following proceedings were had out of the hearing of the jury:)

MR. MARTIN: If the Court please, up to this point it is the government's position we have laid the foundation for the conversation between this officer and Mr. Kaufman. We have fixed the place, time, those who were present at the time of the conversation, and that this conversation was about the gun which was in the car, which gun is now, has been introduced in evidence, will be identified by this officer, so that any conversation which the defendant had with him would be admissible in evidence at this time.

THE COURT: I am well aware of what is necessary to establish the groundwork for the admission of a confession; however, in this case, or any statements that this man would have made, you have got a different situation, and you also have the last case that was handed down by the Supreme Court of the United States. And over and above that, in this particular case, of course I don't understand particularly why they are resisting this, since by his opening statement he's admitted that the defendant has committed this crime. I think that he and the defendant both are bound by that judicial statement.

MR. BARSANTI: That's correct.

THE COURT: The only question that is really to be decided by this jury is whether he was insane at the time and didn't know what he was doing. After they determine that, why then they will either determine that he is guilty or not guilty by reason of insanity.

MR. MARTIN: If the Court please, I think any and all statements and conversations that this defendant had on the date of the commission of the crime, which is December 16, 1963, would be material upon that question. That is, not only upon the question of the guilt or innocence of the commission of the crime, but also upon the question of his sanity.

THE COURT: Well, until such time as that issue is before the Court, why then I think that the objection is well founded, and if you want to bring the people back

in rebuttal, that is up to you, and I think you are going to have to bring them back to testify, but I don't think you can have him testify about it now, in view of the fact, first of all, while this is going to be an issue in the [79] case, it is not presently one, and you can't anticipate. I assume it is going to be made, first of all, made a statement without being advised of his rights, without having counsel, among other things, and what is it, the Jackson, is that the last one? It came down June 22.

MR. MARTIN: Well, the Escabido case, well, that case is inapropos completely in this situation, if the Court please, because in that instance the factual situation is one—

THE COURT: I am aware of the situation. He had a lawyer and they wouldn't permit him to talk to him, but I think that we are going pretty far abroad in this. I think that once they put in issue his mental capacity, then these people can testify as to these other things on the grounds to show a mental capacity, but you don't need them now, and I don't see the reason for cluttering up this record with the possibility of an error.

MR. MARTIN: Well, if the Court please, the nature of the conversation at this time was that the defendant was the first one that informed the officer that he did have a gun. No, we can omit that and I will bring him back for rebuttal.

THE COURT: I see no reason to bring it in now. First of all, the gun has been identified as sold to the [80] defendant. Now, I don't know who recovered the gun from this man. Who recovered the gun from the car?

THE WITNESS: Cliff Martin.

THE COURT: Is he going to testify here?

MR. MARTIN: Cliff Martin recovered the gun in the presence of this officer.

THE COURT: Which officer?

MR. MARTIN: Cpl. Stahl.

THE COURT: You saw somebody take the gun out of the car?

THE WITNESS: Martin is the one I saw take the gun from the car.

THE COURT: That is all you have got to do is have him testify that he saw the gun taken out of the automobile. You got him buying the gun. Now you got it in his automobile at the time of his arrest. That straightens that part of it. Now, what else do you need out of the confession?

MR. MARTIN: All right, Your Honor. We will proceed that way.

THE COURT: Get the jury.

(Thereupon, the trial was resumed within the hearing of the jury as follows:)

THE COURT: Proceed.

MR. MARTIN: Thank you, Your Honor.

[81] Q (By Mr. Martin) Cpl. Stahl, I will show you a .38 Smith & Wesson revolver, Serial Number 287393, marked as Government's Exhibit No. 6, and ask you, sir, if you have seen that gun before?

A Yes, sir.

Q When was the first time you saw that gun?

A At Martin's Towing Service.

Q On what date, sir?

A On the 16th of December, 1963.

Q Where was the gun at the time you first saw it?

A In the back seat of the car.

Q When you say "the car", you are referring to the 1964 red Rambler bearing New York license plate 8Z6367?

A That's right.

Q Now, sir, at the time you first saw that gun in that particular automobile, was it loaded or unloaded?

A It was loaded.

Q Fully loaded?

A Yes, sir.

Q Who, if anyone else, was present, sir?

A Cliff Martin.

Q And what, if anything, did you do with the gun at that time?

A We removed it from the car.

[82] Q And after removing it from the car, what, if anything, did you do?

A Wrapped it in a towel, and we placed it in Mr. Martin's desk until the Federal agents arrived.

Q Was the gun subsequently turned over to the Federal agents?

A It was; yes, sir.

MR. MARTIN: No further questions, Your Honor.

THE COURT: All right. Just a minute, Corporal.

MR. BARSANTI: Just a minute, Your Honor.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Cpl. Stahl, what time did you get the message from your dispatcher to be on the lookout for a certain automobile on the 16th?

A I'd say 4:30 or 4:35.

Q Were you at that time at the edge of the bridge, or end of the bridge?

A I was only just a block or so away. I was a couple blocks away at the time I received the call.

Q This is the end of the bridge, or the entrance, whichever you might call it, right at Alton?

A Yes, sir. It comes into Alton on Broadway.

Q Which one of the bridges?

[83] A That is the Clark Bridge.

Q You stationed yourself then at the end of the bridge?

A Yes, at the—that's right.

Q About how much later was it that you observed this red Rambler proceeding across Clark Bridge?

A Around, oh, five minutes, I would say.

Q How far did you pursue the red Rambler?

A About four blocks.

Q How fast was it going when it came off the bridge?

A It wasn't going at any high rate of speed. I would judge 25; 20 or 25, maybe 30 miles an hour.

Q How fast was it going through Alton?

A About the same speed.

Q Did it violate any traffic regulations in the way of stop signs and stop signals?

A No, sir.

Q How long did you follow it before you turned on your red light on your cruiser?

A A block and a half, roughly.

Q Did you actually pull up alongside of this car eventually, or were you always behind it?

A I stayed behind it. I was behind the car.

Q Did you have your siren on?

A No, sir, I did not use the siren.

[84] Q What was the light condition at that time?

A It was daylight.

Q What was the general road condition?

A It was, well, for the most part it was dry. There were some icy spots.

Q What sort of street, what is the street that you were following the red Rambler on?

A East Third. First on Langdon, and then on East Third.

Q What is that a, a two-lane, four-lane street?

A Two-lane. Well, now, wait a minute. It is two moving lanes.

Q Two parking lanes and then two moving lanes?

A Yes.

Q So there would be a line of traffic going in each direction?

A Two lines of traffic, yes, sir, one going in each direction.

Q What were traffic conditions at that time?

A In that particular location, they were about normal. They weren't heavy.

Q Well, would you characterize it as not heavy, but would it be light traffic?

A Well, light traffic. I would say light traffic.

[85] Q You indicated when the turn was made into George Street, or attempted turn into George Street, the car skidded?

A It did.

Q Did it actually make the turn into George Street and then skid?

A It skidded when he attempted to turn. There was a spot of ice at that particular intersection right on the, well, it would be on the left side, on his left side, be-

NCR



**MICROCARD[®]
EDITIONS, INC.**

PUBLISHERS OF ORIGINAL AND REPRINT MATERIALS ON MICROCARDS
901 TWENTY-SIXTH STREET, N.W., WASHINGTON 7, D. C. FEDERAL 3-6393

CARD

2

cause as I motioned him to pull in to the curb, it looked as though he had intended to go straight, and when he saw the police car he attempted to make a right turn, which would have made him pretty well past the center of the intersection and put him on the wrong side of the street in making the right turn, and there was a spot of ice there which caused him to skid.

Q You were behind his vehicle at all times?

A Yes, sir, I was. When it come off the bridge—well, there was another car between his car and mine, and when he got to the Third Street intersection, the other car went straight up the hill, and he made a left turn.

Q Then you were the only car behind him?

A That made me the only car behind him.

Q For what distance was that?

A Approximately three blocks.

[86] Q During that three blocks, did the Rambler speed up at all?

A No, sir.

Q It maintained the same pace of speed it had been maintaining?

A Yes, sir.

Q You say you motioned for the automobile to pull over. You motioned while your vehicle was behind the Rambler?

A I did; yes, sir.

Q To the extent you said the car rolled away from the tree a little bit back across the street. It hit a tree and then it rolled away from it?

A That's right.

Q Back across the street, or away a few feet?

A Where he attempted to make the turn, it was going up a hill. When the car skidded, it went over a curb and it went up the sidewalk, and there was a stone wall on his left, and there wasn't room for the car to go between the wall and the tree. He hit the tree with the right front fender and bumper of his car, killed the engine, and the car rolled backwards.

Q Who got out of the vehicle first, you or Mr. Kaufman?

A I think we both got out about the same time.

[87] Q You stopped right next to where his car stopped?

A I stopped—that would put me almost in front of him. He rolled backwards down the hill. My car was here (indicating). I stopped right where I was and got out of my car, and he got out of his about the same time I did.

Q Did you observe him having any difficulty getting out of his car?

A I did not; no, sir.

Q Or in getting into your cruiser?

A No, sir.

Q How long was it before he got into your cruiser?

A A matter of a minute or so; just very short time; I couldn't say definitely.

Q The car he had been driving could not be operated?

A It could have been driven, possibly.

Q You called the wrecker, what, by radio?

A I called my headquarters and asked them to send wreckers over, sir.

Q What was the hit-and-run charge that you were looking for this automobile for?

A Well, he had been involved in a hit-and-run accident in Missouri. Missouri State Highway or Kirkwood police, Missouri State Highway Patrol called our headquarters by radio and asked us to intercept this automobile if he came across the bridge, and I was going to—my thought was to talk to the man about the accident on this side of the river, and Missouri authorities would be notified, and they were on their way over there to talk to him also in regards to the matter.

Q Missouri authorities were notified?

A They were notified that the man was apprehended, yes, sir.

MR. BARSANTI: No further questions.

MR. MARTIN: No further questions.

THE COURT: Thank you. You may be—well, you will have to hold yourself available.

CLIFFORD A. MARTIN,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q Will you state your name, please?

A Clifford A. Martin.

Q What is your business or occupation, Mr. Martin?

A Towing service.

Q And where is your business located?

A In Alton, Illinois.

Q Now, sir, were you operating that business on December 16, 1963?

A Yes, I was.

Q Some time after 4:30, around 4:45 P.M. that day, did you receive a call from the Alton police to tow in a 1964 red Rambler?

A Yes, I did.

Q And did you tow that car in, sir?

A I did.

Q Can you tell us from where you towed the automobile to where you took it? Where did you pick it up, and where did you take it?

A I picked the car up at Third and George Street in Alton, and towed it to my place of business at 299 East Elm, in Alton, inside of the building.

Q When you went to get the automobile, was anyone present on the scene where the automobile was?

A Officer Stahl was there, but they were leaving when I arrived.

Q Then you took it to your garage, is that right, sir?

A Yes, sir.

Q Now, sir, I will show you a Smith & Wesson revolver, Serial No. 287393, marked as Government's Exhibit No. 6, and ask you whether or not you ever saw that exhibit before?

A Yes, sir, I did.

[90] Q Now, will you tell us when was the first time you saw that exhibit?

A Shortly after I parked the car in the garage. We always check out everything we bring into the garage to see if there's any personal belongings or anything that should be taken care of, and that is when I found the gun in the back seat of the car.

Q Was it on the seat, or on the floor, or where?

A On the seat, with the barrel pointing against the left-hand panel.

Q Now, sir, from the time that you got this automobile at Third and George in response to the call of Cpl. Stahl, until the time you found this revolver, which is Exhibit No. 6, in the car, had anyone else been in that automobile?

A No, sir.

Q What, if anything, did you do with the gun when you found it?

A At the time, I didn't do a thing but go back and call the Alton Police Department and told them that we had found a gun in the car, and asked them to send a man out to take care of it.

Q And did they send a man out?

A They did.

Q Whom did they send out?

A Cpl. Stahl.

[91] Q After Cpl. Stahl arrived at your place, what, if anything, was done with the gun?

A I picked up a pencil and stuck it in the barrel end and took it out of the car and brought it in and set it on a shop towel on my desk. When Cpl. Stahl got there, he said to finish wrapping it and lock it up until the F.B.I. arrived.

Q Then what did you do?

A I wrapped it up and locked it up in the drawer under his vision.

Q Then what did you subsequently do with the gun?

A Agent Haynes, I believe it was, came in and picked up the gun.

Q That is F.B.I. agent from the Alton vicinity?

A Yes, sir. Maybe it was Talley on that agent.

Q Both of these gentlemen are F.B.I. agents?

A Yes, sir.

MR. MARTIN: No further questions.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Mr. Martin, what time did you get a call to go tow the automobile in?

A It was approximately 4:43 or 44; something like that. I don't have the exact time. I could get it, but I didn't bring it with me.

[92] Q What time did you arrive at the scene?

A Within about two or three minutes.

Q How far away is your place of business?

A I would say about not over a mile, but I was on the air on my truck at the time I received the call from my base. We have radio dispatched trucks.

Q You say Cpl. Stahl was still present?

A He was at the scene; yes, sir.

Q Where was he when you arrived?

A He was getting into his car, if I remember right, getting ready to leave the scene to go to the station. There was another car come in that was assisting on this, I believe, at the time I was there.

MR. BARSANTI: No further questions.

THE COURT: All right.

MR. MARTIN: No further questions.

THE COURT: All right. You may be excused, Mr. Martin.

(Witness excused.)

(Thereupon, a rental contract was marked by the reporter as Government's Exhibit No. 8 for the purpose of identification.)

JOHN LIGHT,

being first duly sworn, testified in behalf of the government as follows:

[93]

DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir.

A John Light.

Q What is your business or occupation, Mr. Light?

A Alton Police Sgt., on the Alton Police Department.

Q Were you employed by the Alton Police Department on December 16, 1963?

A Yes, I was.

Q Were you called to the scene of an accident by Cpl. Stahl on that date?

A Yes, sir.

Q Where was this accident?

A Third and George, in Alton.

Q And did you see the automobile which was involved in the accident?

A At the time when I arrived, the auto was being towed away from the scene.

Q Did you see a man that Cpl. Stahl had in custody at that time?

A Yes, sir.

Q Do you see that man in the courtroom?

A Yes, sir.

Q Will you point him out to us, please, sir?

[94] A He is sitting next to you, sir.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: All right.

Q (By Mr. Martin) Did you accompany Cpl. Stahl back to the police station?

A Yes, sir, I followed Cpl. Stahl in my car, in my squad car.

Q And after you arrived at the police station, did you search and assist in the search of the man that was in custody, the defendant?

A Yes, sir.

Q Now, sir, I will show you automobile rental contract from the Metro Auto Rental, Incorporated.

MR. BARSANTI: If the Court please, if I might object to this line of questioning, anything taken from the person of Mr. Kaufman at this time, I will object to it. This is—

THE COURT: I can't hear you.

MR. BARSANTI: If the line of questioning is anything taken from Mr. Kaufman by the Police Department or any agent, I will object to any testimony about it or any introduction.

THE COURT: On what grounds, Mr. Barsanti?

MR. BARSANTI: That it wouldn't be relevant to this man. While there may have been an arrest on another [95] matter, another suspicion, it would not justify search of this person for evidence which might be relevant in this case.

THE COURT: I will overrule that.

Q (By Mr. Martin) Now, sir, here is Government's Exhibit No. 8 which is a Metro Auto Rental, Incorporated, rental contract for an automobile. I will ask you if you have ever seen that contract before, sir?

A There was such an auto rental sheet on his person at the time he was searched. There was. This resembles the one that I took from his person.

Q All right. Sir, what, if anything, did you do with the contract that you took from his person on the date that you searched him, December 16, 1963?

A I turned it over to Capt. Petersen of the Alton Police Department.

Q What, if anything else, did you find on his person during the course of that search?

A I found a total of \$352.50 in currency on his person.

Q What, if anything, did you do with that currency?

A I turned the currency over to Capt. Petersen of the Police Department.

Q That is your immediate superior in the Alton Police Department?

A Yes, sir.

[96] MR. MARTIN: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Mr. Light, before you searched Mr. Kaufman, did you advise him that he had a right to consult an attorney?

A He talked with Lieutenant—

MR. BARSANTI: Excuse me. Would you please respond to the question I asked you?

THE COURT: He asked if you advised him.

THE WITNESS: No, sir, I did not.

Q (By Mr. Barsanti) Was anybody else present when you searched him?

A Yes, sir.

Q Who?

A Cpl. Stahl.

Q Did Cpl. Stahl advise him of his right to counsel?

A I have no knowledge of that, sir.

Q You didn't hear it done?

A No, sir.

Q Where was this? In the Alton Police Station?

A Yes, sir.

Q At that time, you removed what you identified as Government's Exhibit 8, this so-called rental contract, or one like it, and his cash?

A Pardon?

[97] Q You took the cash and the contract, which is Government's Exhibit 8, from his person at that time?

A Yes, sir.

MR. BARSANTI: I have no further questions.

THE COURT: All right.

MR. MARTIN: No further questions, Your Honor.

THE COURT: All right. Step down.

(Witness excused.)

WILLIAM H. PETERSEN,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir.

A Captain William H. Petersen.

Q What is your business or occupation, Mr. Petersen?

A Captain of Police, Alton, Illinois, Police Department.

Q Sir, were you employed in that capacity as Captain in the Alton Police Department on December 16, 1963?

A I was.

Q Were you on duty that afternoon that day?

A I was.

Q Were you present when Harold Kaufman was brought into the station?

[98] A I was.

Q Do you see Harold Kaufman in the courtroom today?

A Yes, sir, I do.

Q Will you point him out to us, please, Captain?

A The gentleman sitting at the end of the table there.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: Yes, the record will so show.

Q (By Mr. Martin) In whose custody was he at the time he was brought into the Alton Police Station?

A Cpl. Stahl and Sgt. John Light.

Q Had he been arrested?

A Yes, sir, he had.

Q Under what name had he been arrested at that time, sir?

A He gave the name of Donald Taylor.

Q Now, sir, were you present when the defendant, Mr. Kaufman, was searched by Sgt. Light while Cpl. Stahl was there?

A Yes, sir, I was.

MR. BARSANTI: If the Court please, I will object to that testimony. He is impeaching the testimony of Sgt. Light.

THE COURT: Well, I don't think that is a proper objection. It will be overruled. He may testify.

[99] MR. MARTIN: I think he answered that he was present.

THE COURT: Yes.

Q (By Mr. Martin) Now, sir, the items of personal property and belongings that were removed from the person of the defendant, Harold Kaufman, during the course of that search, were they turned over to you, sir?

A Yes, sir, they were.

Q Do you have a list of the items that were turned over, sir?

A The only items that I have listed, sir, are the valuable items which was taken from him, such as money, billfold, and other—

Q Now, sir, how much money was taken from him?

A \$352.03, I believe, sir.

Q What, if anything, was done with that money?

A The money was separated by denominations and later released to Mr. Al Rushing of the F.B.I. I have a receipt where it was released.

Q And do you have that receipt with you, sir?

A I do, sir.

Q Now, sir, will you refer to that receipt and tell us how many one dollar bills was in that group of bills that were released to the F.B.I. agent?

A There were seventy one-dollar bills.

[100] MR. MARTIN: No further questions, Your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Capt. Petersen, do you know of any reason why Sgt. Light can't remember that you were present when—

MR. MARTIN: I will object to that, if the Court please.

THE COURT: It will be sustained.

Q (By Mr. Barsanti) You were present at all times when Sgt. Light and Cpl. Stahl searched Kaufman?

A At the time of the search, yes. I was standing to the rear of the officers near our exit door.

Q Who else was in the room?

A Cpl. Stahl, Sgt. Light, Mr. Kaufman, and at one time Lt. Schmidt was there, the commanding officer of the afternoon shift.

Q Did you advise Mr. Kaufman of his right to have an attorney?

A Did I advise him?

Q Yes.

A No, sir, I did not.

MR. BARSANTI: No further questions.

THE COURT: All right.

MR. MARTIN: No further questions, Your Honor.

[101] THE COURT: Step down.

(Witness excused.)

THE COURT: We will have our morning recess. Members of the jury, bear in mind the admonition I have given you heretofore.

(Following a brief recess, the further following proceedings were had:)

A New York City Court Summons was marked by the reporter as Government's Exhibit No. 9 for the purpose of identification.

A receipt was marked as Government's Exhibit No. 10 for the purpose of identification.

A Western Union receipt was marked as Government's Exhibit No. 11 for the purpose of identification.

A receipt from Bade's Sunoco was marked as Government's Exhibit No. 12 for the purpose of identification.)

JOHN L. NEWCOMER,

being first duly sworn, testified in behalf of the government as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q Will you state your name, please, sir?

A John L. Newcomer.

Q What is your business or occupation, Mr. Newcomer?

[102] A I am employed as a special agent with the Federal Bureau of Investigation.

Q And were you employed as a special agent of the Federal Bureau of Investigation on December 16, 1963?

A Yes.

Q To what office were you assigned, sir?

A The St. Louis office.

Q And did you have occasion to participate in the investigation of the robbery of the Roosevelt Federal Savings and Loan Association that occurred on December 16, 1963?

A Yes.

Q And during the course of that investigation, did you have occasion to search a 1964 red Rambler bearing New York license plate 1963 8Z6367?

A Yes.

Q And where, sir, was that automobile at the time you searched it?

A The automobile was at a towing service garage titled Cliff's Towing Service, in Alton, Illinois.

Q Now, sir, I will show you two folders which are marked as Government's Exhibits 5-A and 5-B, containing American Express Travelers' Checks. Will you examine those, sir, and tell us whether or not you have seen those before?

A Yes, I have seen these.

[103] Q When was the first time you saw those?

A On the night in question I found these two packets on the floor board of the red Rambler.

Q And what, if anything, did you do with those two folders after you found them in that red Rambler?

A I placed each of them in a plastic envelope, identified them for what they were, and initialed them and

dated them on a white slip of paper, and placed that into the envelope along with the packets.

Q And, sir, did you subsequently bring those to your St. Louis office?

A Yes, I did.

Q Did you make an inventory of the checks contained in those two folders?

A Yes, I did.

Q Sir, will you look at those two folders again, look in the inside, the articles inside.

(The witness looks in folders.)

Q Now, sir, I will ask you whether or not anything has been added to those two folders, or taken from those two folders, from the time that you found them until you are examining them now?

A No, there hasn't been anything added or taken away.

Q Now, sir, I will call your attention particularly to [104] the checks contained in there, the Travelers' Checks. When you arrived at your office here in St. Louis, did you make an inventory of those Travelers' Checks?

A Yes, I did.

Q An you inventoried them by denomination and by serial numbers?

A Yes.

Q Will you tell us the face value of the Travelers' Checks contained in those two packets?

A Do you mean the total value?

Q Yes. Yes, sir.

A Total contents of the two packets contained \$11,520 in American Express Travelers' Checks.

Q Now, sir, have you had occasion to check your serial numbers with the serial numbers made up by Mr. Woollen of the Federal Savings and Loan Association?

A Yes, I did.

Q Now, I will show you Exhibit 4, which is his list of serial numbers, and ask you whether or not there is any discrepancy between the list of serial numbers that he has there and the list of serial numbers that you found or inventoried?

A No, the serial numbers and the totals are the same.

Q All right. Thank you, sir. Now, sir, here is a sum-
[105] mons Number B1084276 in the Criminal Court of
the City of New York for traffic violations, marked as
Government's Exhibit No. 9. Have you ever seen that
before?

A Yes.

Q When was the first time you saw that exhibit?

A On the same evening that I had occasion to find the
packets of Travelers' Checks.

Q And did you find that exhibit, sir?

A Yes.

Q Where?

A This was found in the car.

Q Now, sir, here is a gasoline receipt showing the
date of 12-15-63, from Harrisburg, Pennsylvania, for pay-
ment of gasoline, marked as Government's Exhibit No.
10. Have you seen that exhibit before?

A Yes.

Q Was that recovered from the same red Rambler on
December 16, 1963?

A Yes, same time, same occasion.

Q Sir, here is a Western Union Telegraph receipt,
Harrisburg, Pennsylvania, dated December 15, 1963. The
time shown is 10:40, showing a payment of fifty dollars
from Paul King, Telegraph Money Order to Mrs. Pat
Scott of New York City, marked as Government's Exhibit
[106] No. 11. Have you seen that receipt before, sir?

A Yes.

Q And where was the first time that you saw that?

A This was found also in the car, at the same time,
same occasion.

Q All right, sir. Here is a receipt for road service
marked Government's Exhibit No. 12, from Bade's Sanoco
Station, at Eastern and Mills Roads, Willow Grove, Penn-
sylvania, dated December 15, 1963. Have you seen that
receipt before?

A Yes.

Q When is the first time you saw that receipt?

A On the same night, found it in the car, same occa-
sion.

MR. MARTIN: If the Court please, I'd like to offer into evidence Government's Exhibits 9 through 12, inclusive.

MR. BARSANTI: May I see them? If the Court please, I would object to the introduction of these exhibits, specifically Exhibit 9, first number, not being relevant to any matter in issue in this case, found and attempted to be used as evidence. This matter was obtained in a search which was illegal, and Exhibit 10—further, on Government's Exhibit 9, we further object, there has been no identification that it would be in any way connected with this defendant, Harold Kaufman. In no way connected with defendant Harold Kaufman. No identification on it as such.

THE COURT: Let me see.

[107] (Mr. Barsanti hands exhibit to the Court.)

THE COURT: What else?

MR. BARSANTI: Government's Exhibit 10, which purports to be a receipt from the Tidewater Oil Company Products of such station, no identification as to what the receipt is actually from. It indicates that a certain dollar amount, apparently for gasoline, but it is not sure. It indicates cash. No relationship or tie to this matter, Harold Kaufman. There is an attempt to use it as evidence in this charge here. It was obtained illegally by the F.B.I. He was not under arrest by the United States Government at that time. He was being held by the Alton Municipal Police Department for the Missouri State Highway Department on a traffic violation. It would further not be relevant to any matter in this proceeding.

THE COURT: All right.

MR. BARSANTI: Government's Exhibit 11 purports to be a Western Union telegraphic receipt. Subject to the same objections made on Exhibit 10. It was taken from this vehicle by special agent of the F.B.I. from Mr. Kaufman while he was not under the arrest of the United States Government; obtained illegally. There is also no evidence of this being relevant in the matter affecting Harold Kaufman in the evidence on this point.

[108] THE COURT: All right. What else have you got?

MR. BARSANTI: And Exhibit 12, which purports to be a receipt from Bade's Sunoco Station of some kind; same objection, Your Honor. It was obtained by a special agent of the F.B.I. when the defendant was not under arrest by the United States Government. He was being held on a traffic charge. This was not related to Mr. Kaufman in any way, or anything showing there would be any relevancy in this proceeding.

THE COURT: What do you have to say, Mr. Martin? Are you going to connect it up later?

MR. MARTIN: If the Court please, the exhibits are offered for the purpose of showing where the automobile was at various times immediately preceding this robbery. The first one shows that it was in New York. It shows the date it was in New York. The others show that the automobile was brought from New York to St. Louis through the points there where those receipts were given. At the time of the search, the automobile had been wrecked, was in the custody, more or less, of the Alton Police, and that these are not items taken from the defendant himself. I could give the Court some additional information on the question of the legality of the search, if the Court has any question in mind.

MR. BARSANTI: If the Court please, further comment, the purpose for the introduction of this, Mr. Martin [109] stated, there certainly has been no evidence which would make that connection possible. There is no evidence which would show that those relate to the matters he is trying to prove by that. The traffic violation ticket, which I believe is Exhibit 10, certainly is not related to Mr. Kaufman in any way.

THE COURT: It is related to the automobile.

MR. BARSANTI: It may be related to the automobile, but there is no identification Mr. Kaufman was driving that automobile on this date. It would be hearsay evidence to be introduced in this way.

THE COURT: Well, I think it would merely go to show the presence of the automobile in New York on the 14th day of December, 1963. Frankly, I don't know what

this would prove, because it has no—it has a date on it, but I don't see any location.

MR. MARTIN: The code is HBGPA. That is Harrisburg, Pennsylvania.

THE COURT: I will let them in on the basis he will tie them up later.

MR. MARTIN: Thank you, Your Honor.

(Whereupon, Government's Exhibits No. 9, 19, 11 and 12 were received in evidence.)

MR. MARTIN: No further questions, if the Court [110] please.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Mr. Newcomer, at the time you searched this Rambler automobile at Cliff's Towing Service, what time of the evening was that?

A Approximately 9:00 o'clock.

Q Who else was present when you searched it?

A Special Agent James Talley of the same organization, Cliff, the owner of—Cliff Martin, the owner of the garage, two of his employees, whose names I do not know.

Q How long were you at the garage?

A Roughly two hours.

Q At the time you began searching the automobile at 9:30, was Mr. Kaufman under arrest by the United States Government?

A That I do not know.

Q You proceeded there from the St. Louis office?

A Yes.

Q What time did you get notification to proceed to Alton?

A I had earlier been at the Savings and Loan Association in St. Louis, and approximately an hour after I had been at the Savings and Loan Association I was asked [111] to proceed to Alton.

Q What time did you arrive at the Savings and Loan Association?

A I'd say in the neighborhood of 6:30.

Q So you would have gotten the notice to proceed to Alton somewhere around 7:30, the best you can place it?

A Approximately, yes.

Q Did you proceed directly to Cliff's Towing Service Garage?

A Yes.

Q Were you informed when you were to proceed to Cliff's Towing Service that this might be in connection with the robbery of the Savings and Loan Association you were investigating?

A Yes.

Q And from whom did you receive those instructions?

A From the assistant agent in charge of the St. Louis office, Mr. Donald Morley.

Q Donald Morley?

A Yes.

Q Was there another agent with you at the Savings and Loan Association making the investigation?

A I was with Special Agent James Talley.

Q You proceeded then to the garage in the same vehicle or in separate vehicles?

A No, we were in the same vehicle.

Q After you left Cliff's Garage, which you stated was roughly when? About what time?

A Roughly 11:30.

Q And from there where did you go?

A We returned directly to the office of the Federal Bureau of Investigation at St. Louis.

Q Arriving at about what time?

A Around 12:30.

Q When you arrived back here at the office, was Harold Kaufman, the defendant in this matter, present?

A Not to my knowledge.

Q To your knowledge, at that time, had he been placed under arrest by the United States Government?

A Not to my knowledge.

MR. BARSANTI: No further questions.

MR. MARTIN: No further questions.

THE COURT: Step down.

(Witness excused.)

ALBERT J. RUSHING, JR.

being first duly sworn, testified in behalf of the government as follows:

[113] DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir.

A Albert J. Rushing, Jr.

Q What is your business or occupation, Mr. Rushing?

A I am a special agent with the F.B.I.

Q How long have you been a special agent with the F.B.I.?

A Twenty-two years.

Q Calling your attention to the date of December 16, 1963, were you a special agent with the Federal Bureau of Investigation on that date?

A Yes, sir, I was.

Q And did you participate in and assist in the investigation of the robbery of the Roosevelt Federal Savings and Loan Association, which occurred on December 16, 1963?

A Yes, I did.

Q Sir, did you have occasion to go to the Alton Police Department?

A Yes, sir, I did.

Q Did you have occasion to contact Capt. William Petersen of the Alton Police Department?

A Yes, sir, I did.

Q Was this on December 16, 1963?

[114] A Yes, sir.

Q And did he have occasion to turn over some items to you?

A Yes.

Q Now, sir, I will show you a rental, automobile rental contract of the Metro Auto Rental, Incorporated, from New York, marked as Government's Exhibit No. 8, in the name of Arthur Cooper, and ask you whether or not you recognize that contract?

A Yes, sir, I do.

Q When was the first time you saw that contract?

A On the evening of December 16, 1963.

Q Was that given to you?

A Yes, sir, it was given to me by Capt. Petersen.

Q Now, sir, did Captain Petersen give you anything else on that date?

A Yes, sir.

Q What else did he give you?

A Well, he gave me some money.

Q And how much money did he give you?

A He gave me \$352.03.

Q And do you have some money with you now, sir?

A Yes, sir, I do.

Q May I have that, please, sir?

[115] (Witness hands envelope to Mr. Martin.)

Q (By Mr. Martin) This is just coins?

A Yes, sir.

Q No writing on it, or anything?

A No, sir.

MR. MARTIN: Will you mark it?

(Thereupon, a plastic envelope containing currency and an envelope containing coins was marked by the reporter as Government's Exhibit No. 13 for the purpose of identification.)

Q Now, sir, I will give to you Government's Exhibit 13, which is a package of money, currency and coins. Sir, have you ever seen that package before, the money contained in the package?

A Yes, sir.

Q When was the first time you saw the money contained in that package?

A On the evening of December 16, 1963.

Q And is that part of the money received from Capt. William Petersen of the Alton Police Department?

A Yes, sir, it is.

THE COURT: Is it a part, or all?

THE WITNESS: It is part.

Q (By Mr. Martin) And how much is contained in [116] that package there, sir?

A \$328.50.

Q I believe you said that Capt. Petersen gave you \$352.03?

A Yes, sir.

Q Well, there is a difference?

A Yes, sir.

Q What did you do with the difference between the \$352.03 and the \$328.50?

A I delivered that to Harold Kaufman on December 18, 1963.

Q Now, how much money did you deliver to Harold Kaufman?

A I delivered to Harold Kaufman \$29.58.

Q And why did you give him that amount, sir?

A Because the total amount of money that had been recovered in this investigation exceeded by that amount the amount which the Roosevelt Federal Savings and Loan Association reported as having been stolen.

Q Now, sir, did you inventory the bills by serial numbers and denominations, which you received from Capt. Petersen?

A Yes, sir, I did.

Q Did you make a list of those serial numbers?

[117] A Yes, sir, I did.

Q Now, sir, I will ask you if you have seen the list of serial numbers of fifty one-dollar bills which has been marked as Government's Exhibit 3?

A Yes, sir, I have.

Q Now, sir, of the money that you recovered or received from Capt. William Petersen of the Alton Police Department, how many one dollar bills did you receive from Capt. Petersen?

A There were seventy one-dollar bills received from Capt. Petersen.

Q Now, sir, of those seventy one-dollar bills, did you compare the serial numbers of those bills with the serial numbers of the bills listed on Government's Exhibit No. 3?

A Yes, sir, I did.

Q And you also have inventoried those serial numbers yourself, sir?

A Yes, sir.

Q Now, of those seventy one-dollar bills that you received from Capt. Petersen, how many of those one dollar bills appear on the list which is marked as Government's Exhibit No. 3?

A Fifty of them.

MR. MARTIN: If the Court please, I'd like to offer into evidence Government's Exhibit No. 8, and the money, [118] Exhibit No. 13.

THE COURT: All right.

MR. BARSANTI: I object to Government's Exhibits 8 and 13 for the reason that they were taken from the person of Harold Kaufman illegally, and that they were removed by the Alton Police Department in the course of a traffic investigation. They are being used in this proceeding by the United States Government, and Mr. Kaufman, when they were taken from him, was not under arrest by the United States Government. He was under investigation very shortly thereafter, or immediately thereafter, and I move that they be excluded.

THE COURT: That will be overruled.

(Whereupon, Government's Exhibits Nos. 8 and 13 were received in evidence.)

MR. MARTIN: No further questions.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Mr. Rushing, did you make any reports, at any time, concerning the activities you engaged in, in this investigation?

A Yes, sir.

MR. BARSANTI: Could I get those reports, Mr. Martin?

MR. MARTIN: Maybe you can find it easier than I [119] can.

THE WITNESS: I have the originals of the report.

MR. MARTIN: You have the original pertaining to the recovery of the money and the contract?

THE WITNESS: Yes, sir.

Q (By Mr. Barsanti) Well, would these be all of the reports which you made or filed in connection with this investigation?

MR. MARTIN: If the Court please, I will object to all of the reports. I think he is only entitled to any report pertaining to the matter about which he has testified.

THE COURT: I think that's right. You are entitled to that.

MR. BARSANTI: All right.

MR. MARTIN: Will you find that one for us, Mr. Rushing, pertaining to the recovery of the money and the contract, the items from the Alton Police Department?

(Mr. Rushing steps down from the witness stand to his files.)

MR. MARTIN: If the Court please, may the record show that we are delivering to counsel for the defense, report of Special Agent Albert J. Rushing, Jr., dated December 19, 1963, pertaining to information received from Capt. William Petersen of the Alton Police Department?

[120] We are also delivering to him the handwritten notes of Mr. Rushing pertaining to the inventory of the bills and the money received from the Alton Police Department, together with a copy of a receipt of Harold Kaufman for receipt of \$29.53.

THE COURT: All right.

MR. BARSANTI: May I have just a moment, Your Honor?

THE COURT: You may.

(Mr. Barsanti looks at report furnished to him.)

Q (By Mr. Barsanti) Mr. Rushing, the documents and reports which have been turned over to me, are these all of the reports which you made in connection with these matters you have testified about so far?

A No, sir. There would be a report pertaining to my return or delivery of money to Harold Kaufman. That is a report there pertaining to the receipt of items from

Capt. Petersen, and together with my own written inventory of the serial numbers of the bills.

Q These would be all of the reports relating to what you have testified about going up there and meeting with Capt. Petersen?

A Yes, sir.

Q What time did you arrive at the Alton Police Department?

[121] A Well, I don't know the time, Mr. Barsanti.

Q How did you happen to go to the Alton Police Department?

A Because I was participating in the investigation pertaining to the robbery of the Roosevelt Savings and Loan Association.

Q From whom did you receive a call indicating you should go to the Alton Police Department?

A Well, I didn't receive a call. I was at the Roosevelt Federal Savings and Loan Association in River Roads, and I left from there.

Q To go to the Alton Police Department?

A Yes, sir.

Q Had anybody notified you that there was some reason to come to the Alton Police Department?

A Yes, sir, they had.

Q Who?

A Special Agent Donald Morley, the assistant special agent in charge of the St. Louis F.B.I. office, who was with me at Roosevelt Federal Savings and Loan Association.

Q He notified you to go to the Alton Police Department?

A Yes, sir.

Q Now, were you out at the Roosevelt Federal Savings and Loan Association at the same time that Agent [122] Newcomer and Agent Talley were there?

A There were other special agents there during the time I was there. I do not recall that they were specifically there at the same time I was there.

Q Do you have any recollection at all so that you can fix this time of when maybe you arrived at Roosevelt Federal and when maybe you left there?

A Yes, sir, I can estimate the times.

Q What would be your estimate?

A I would estimate that I arrived at the Roosevelt Federal Savings and Loan Association prior to 5:00 o'clock, and probably no earlier than 4:30. I think it was certainly after 4:30.

Q About how long were you there?

A I believe that I was there certainly in excess of an hour.

Q And when you left there, did you proceed directly to Alton?

A Yes, sir, I did.

Q Did you proceed directly to the Alton Police Department?

A Yes, sir, I did.

Q In light of what you testified, can you give a reasonably good estimate as to when you arrived there?

[123] A I would estimate approximately 6:30 P.M.

Q Did you immediately talk to Capt. Petersen?

A I think I may have been introduced to him shortly after my arrival, but I didn't talk to him in detail at that time.

Q Were you advised that the man who had been identified as Harold Kaufman had been searched?

A While I was at the Alton Police Department, I was so advised.

Q That he had been before you arrived, or after you arrived?

A It was my understanding that he had been searched before I arrived.

Q And did some member of the Alton Police Department advise you of that?

A Yes, sir.

Q Did Capt. Petersen?

A He and others.

Q Who were the others?

A Sgt. Light so advised me.

Q Did you see the defendant, Harold Kaufman, before you received the property you have described from Capt. Petersen?

A Yes, sir, I did see him.

Q Did you talk to him at all?

[124] A No, sir.

Q You just physically saw him?

A Yes, sir.

Q At the time you received the property from Capt. Petersen, was Mr. Kaufman put under arrest by the United States Government?

A At approximately the same time.

Q Which came first?

A I believe that I received the money prior to that time.

Q Were you the one that put Mr. Kaufman under arrest?

A Well, he was, I signed a receipt assuming custody for him. I signed as a representative of the F.B.I. at the Alton Police Department.

Q In other words, the sequence was the Alton Police searched him, you arrived, at least as you recall it, you were advised of him, you saw Mr. Kaufman, but you didn't talk to him. You got the property from Capt. Petersen, and then you put him under arrest?

A I think that is correct, sir.

MR. BARSANTI: I have no further questions.

MR. MARTIN: No further questions.

THE COURT: Step down.

(Witness excused.)

[125] MR. MARTIN: Mr. George Peet. If the Court please, I think maybe we won't need to call this witness at this time. I think the government will rest.

THE COURT: All right.

(The witness leaves.)

MR. MARTIN: We rest at this time.

DEFENDANTS' EVIDENCE

PATRICIA SCOTT,

being first duly sworn, testified in behalf of the defendant as follows:

* * * *

[172]

CROSS-EXAMINATION

[180] Q Incidentally, after Mr. Kaufman left New York City and in the month of December of 1963, did you hear from him?

A When?

Q I think you said the last time you saw him was in December of 1963?

A Yes.

Q Was that in New York City?

A Yes, it was.

Q All right. Now, after the time he left New York City, on the occasion you last saw him in New York City, did you hear from him at any subsequent time?

[181] A I received mail from him.

Q You received mail from him?

A Yes.

Q Did you receive any telephone calls from him?

A Yes.

Q And from where did you receive the telephone calls?

A I think he said he was speaking from the Marshal's office.

Q Speaking from the Marshal's office?

A Yes.

Q Did you receive any telephone calls from him while he was en route from New York City to some destination?

A At an time?

Q After he left New York City until you received a call from him from the Marshal's office, did he call you from any other place?

A I don't think he did; no.

Q And was that the Marshal's office here in St. Louis?

A Yes, I would think so.

Q Did you receive any telegrams from him between the time that he left New York City in December until you received a call from him from the Marshall's office in St. Louis?

A I don't remember any.

Q Do you recall the date on which you received a telephone call from the Marshal's office in St. Louis?

[182]

A No, I do not.

Q At that time, did he tell you why he was in the Marshal's office here in St. Louis?

A No.

Q He didn't tell you why he was calling from the Marshal's office here in St. Louis?

A Well, he didn't have to. I knew why.

Q You knew why?

A Yes.

Q How did you know?

A Because a lawyer called me and told me.

Q What is the lawyer's name?

A The lawyer then in New York was Zaidins, Z-a-i-d-i-n-s.

Q Z-a-i-d-i-n?

A n-s.

Q Is that his first or last name?

A That is his last name.

Q Do you recall his first name?

A Yes. Earl.

Q And when did the attorney call you and tell you that Mr. Kaufman was in St. Louis?

A I think the lawyer called me the day after Harold was arrested. The bondsman also called me. I don't know [183] who called first, but it was either the same day or the day after he had gotten arrested, and they told me he was arrested in St. Louis.

Q Did the lawyer also tell you how he knew that Harold Kaufman had been arrested here in St. Louis?

MR. BARSANTI: I object to the question. It calls for hearsay.

THE COURT: It will be sustained.

Q (By Mr. Martin) Do you know a person by the name of Paul King?

A No, I do not.

Q What is your New York address when you were—as of December 15, what was your New York address?

A 156 East—432 East 156th Street.

Q Which apartment?

A AG.

Q I will show you Government's Exhibit No. 11, which is a Western Union money order receipt, showing from

Paul King fifty dollars to Mrs. Pat Scott at 432 East 156th Street, New York, New York.

A (Indicating yes)

Q Do you notice that? Now, I will ask you did you receive by telegram fifty dollars on or about the date that appears on that receipt of December 15, 1963?

[184] A Yes, I did.

Q Now, I'll ask you again who is Paul King, named as the sender in that telegraph receipt?

A Paul King is Harold Kaufman.

Q Then this money was sent by Harold Kaufman to you?

A Yes.

MR. MARTIN: Just a moment, Your Honor.

THE COURT: That's all right. Take as long as you want.

Q (By Mr. Martin) Now, Miss Scott, the last time that you saw Mr. Kaufman in New York City, did he tell you where he was going?

A Yes, he did tell me.

Q Where did he tell you he was going?

A I'm not sure. I can't really remember where he said he was going, but I know it wasn't St. Louis.

Q Did he tell you why he was going to this particular place?

A He said he was going to pull a job for Christmas.

* * * *

[359]

VOLUME II

JOHN DAVIDSON, M. D.

being first duly sworn, testified in rebuttal in behalf of the government, as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q Will you state your name, please, sir?

A Dr. John Davidson.

Q Dr. Davidson, have you ever seen the defendant, Harold Kaufman, before?

[360] A Yes, I have.

Q What date did you see him?

A I can't recall the exact date without having heard the date said earlier today. I remember seeing him about 9:00 o'clock in the evening at the Federal Bureau of Investigation headquarters and as I heard someone mention before, it was December 16th, I believe.

Q 1963?

A Yes.

MR. BARSANTI: If the Court please, if this witness intends to testify as to any medical examination made of the defendant on December 16, 1963, we will object to any inclusion or any testimony from this doctor as to any examination, or anything else which happened in connection with Harold Kaufman at that time. It was done without his consent. There has been no waiver of any privilege of any kind, and we will object to it.

THE COURT: I don't know what the purpose of it is. Come up and let's make the record.

(Thereupon, the following colloquy ensued among the Court and counsel, at the bench, out of the hearing of the jury:)

MR. MARTIN: If the Court please, this witness will testify that on December 16, 1963, he saw the defendant [361] in the F.B.I. office and observed his demeanor, and he can testify as to what his nervous condition was, and what he observed about him at that time.

MR. BARSANTI: I think the records of this Court will show at this time he had not been brought before the United States Commissioner, or anything else.

THE COURT: I am sure of that, but the point is we have a different condition here than we had in the other case where Dr. Hartman was appointed to examine him by an order of Court of April 23, 1964.

MR. BARSANTI: Well, let me say this. If this man is to testify as to what he observed, and it is not taken into account, not anything said by Harold Kaufman, at this stage I assume he is like anybody else who saw him

physically, We will object to anything, any statement made by the defendant at this time to this man, any of the F.B.I. agents, or anybody else. He was not brought before a Commissioner before a reasonable period of time. He was under intense investigation for a particular crime, and they suspected him particularly of it.

MR. MARTIN: He was brought before the Commissioner on the morning of the 17th.

* * *

[371] GEORGE M. PEET,

being first duly sworn, testified in behalf of the government in rebuttal, as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir.

A George M. Peet.

Q What is your business or occupation, Mr. Peet?

A I am a Special Agent with the Federal Bureau of Investigation.

Q And how long have you been a Special Agent with the Federal Bureau of Investigation?

A Approximately 17 years.

Q To what office were you assigned on December 16, 1963?

A St. Louis.

Q Did you assist and participate in the investigation of the robbery of the Roosevelt Federal Savings and Loan Association which occurred on December 16, 1963?

[372] A Yes, I did.

Q On that date, sir, did you see the defendant, Harold Kaufman?

A Yes, sir.

Q Do you see him in the courtroom?

A Yes, sir.

Q Will you point him out to us, please, sir?

A The gentleman in back with the glasses.

MR. MARTIN: If the Court please, may the record show the witness has indicated the defendant?

THE COURT: Which one are you talking about?

THE WITNESS: The third gentleman, sir.

THE COURT: There's a couple in the first row there. Let the record show he is indicating the defendant.

Q (By Mr. Martin) Did I ask you if you saw him on December 16, 1963?

A Yes, sir.

Q Where did you see him, sir?

A At the Alton Police Department.

Q About what time?

A Shortly before 6:00 o'clock.

Q Will you tell us whether or not there was anyone else present?

A At the time I talked with Mr. Kaufman, at the [373] same time, in the same room, were Special Agent Walls of our office, Special Agent Hanes who is assigned to the Springfield, Illinois, office; there was Chief of Police Obertz of the Jennings Police Department, and also Sgt. Zlotopolski of that same Department. There were five of us all together.

Q Did you observe the defendant at that time?

A Yes, sir.

Q About how long was he in your presence?

A Well, he was in my presence from roughly 6:00 P.M. until he was deposited at the St. Louis Jail at about 9:55 that same evening.

Q And did you talk with him and hear his conversation with other agents and officers who were present?

A Yes, sir.

Q And will you tell us whether or not that conversation that you heard, either between you and the defendant, or the defendant and the other persons present, to you sounded logical or illogical?

MR. BARSANTI: If the Court please, I will object to any testimony that relates in any way to these conversations until it is shown that they were freely and voluntarily received from the defendant. It is still our contention they were not, but any statements made by the de-[374] fendant, or conversations with him, were all part

of the tainted area of the illegally obtained information.

MR. MARTIN: I will withdraw the question at this time, Your Honor, and lay additional foundation.

THE COURT: All right.

Q (By Mr. Martin) Sir, during the time that Mr. Kaufman was in your presence, did you make any threats toward him?

MR. BARSANTI: If the Court please, I will object to that before it goes any further. It is not a proper question at this time. If there is to be an examination in this area, a separate voir dire—

THE COURT: I don't know what area you intend to pursue, but in the interest of saving time, I think it would be better to be done out of the hearing of the jury, and since it is twenty minutes to 5:00, I am going to excuse the jury until 9:30 tomorrow morning and Court will remain in session. 9:30 tomorrow morning. Bear in mind the admonition I have given you heretofore.

(Thereupon, the following proceedings were had out of the hearing of the jury:)

THE COURT: All right. You may proceed.

Q (By Mr. Martin) Agent Peet, while the defendant was in your presence, did you make any threats toward him?

[375] A No, sir.

Q Did you hear any of the other agents or police officers make any threats toward him?

A No, sir.

Q Were you able to observe his nervous condition, sir?

A I was able to observe his condition, his physical condition.

Q Will you describe for us what you observed about his physical condition?

A He was sitting in a chair, perhaps four feet from the desk where I was sitting. He didn't seem terribly nervous at the time. His lip was swollen, and he apparently experienced a little discomfort on the left side, I believe it was, and moved several times back and forth in the chair because of it.

Q Now, sir, did you, or anyone, strike the defendant while he was in your presence?

A No, sir.

Q Did you, or anyone, make any promises to the defendant while he was in your presence?

A No, sir.

Q Was there any discussion about any leniency toward the defendant?

[376] A I didn't quite hear your question.

Q Was there any discussion or mention of any leniency towards the defendant?

A No, sir.

Q Now, sir, did you discuss with him the robbery which had occurred at the Roosevelt Federal Savings and Loan Association?

A Yes, I did.

Q What, if anything, did he tell you, sir?

A Well, he related a story of traveling from New York to St. Louis for the purpose of committing a robbery; that he stopped in Alton, Illinois, on December 16th, the same day of the robbery, and purchased a gun; that he also purchased a holster and some ammunition. That he traveled from Alton along Highway 67 and went down to the River Roads Shopping Center, and there he observed, or, as he said, cased the Savings and Loan Association in that Shopping Center. This was in the early part of the afternoon. And that after having done this, he traveled to the Northland Shopping Center, found another Federal savings and loan association located in that shopping center, and looked it over, and finally decided that the River Roads, the one he had looked at first, was best, so he traveled back to this area, parked his car near the Savings and Loan Association, and went inside. He [377] related that there was a man and a woman present inside, apparently employees, and that he inquired initially about a loan, and had a little discussion with the male employee in the savings and loan; that in a short time he took the gun which he had concealed in his coat pocket; announced that this was a holdup. During this time some customers, one, I believe, with some children, came in. He had the male employee give him the money

from the cash drawer, and he also got Traveler's Checks. Then he herded the people who were there into a back room, told them to remain for, as I recall, he said twenty-five minutes, and then he ran out the front door of the Savings and Loan Association. He went into his car and drove out of the parking area.

He said that as he was driving out of the parking area he saw behind him a police car, and thinking that the police car was after him, he, in his words, panicked and drove off very hurriedly. Perhaps a half mile down the road he hit an automobile, or something, and then continued on toward Alton, Illinois, to a point where he was arrested after hitting a tree with the car, by an officer of the Alton Police Department.

Q Now, sir, during the time that he was talking to you and relating to you the events about which you have [378] just testified, did he talk to you in a logical or illogical manner?

A No, sir, he was responsive to questions that were asked of him.

Q Was his conversation coherent or incoherent?

A It was very coherent.

Q And, sir, can you tell us whether or not he appeared to you to be under any stress or strain at that time?

A Not any undue amount of stress or strain, under the circumstances of having just been arrested and having had an accident in the automobile.

Q Now, sir, can you tell us whether or not you have an opinion as to whether the defendant was sane or insane at that time?

A I have no reason to think that he was other than normal at the time I was talking with him. He gave no indication to me in any way that would lead me to believe otherwise.

MR. BARSANTI: If the Court please, I move that answer be excluded as not being responsive.

THE COURT: Say whether you would consider him to have been sane or insane.

THE WITNESS: Sane.

MR. MARTIN: Thank you, sir. If the Court please, may I approach the bench?

THE COURT: Yes. Come up, Mr. Barsanti.

(Thereupon a colloquy ensued among the Court and counsel, at the bench, out of the hearing of the reporter.)

[379] QUESTIONS BY MR. BARSANTI

Q Mr. Peet, did you make any reports as to your activities in connection with the investigation of the robbery of the Roosevelt Federal Savings and Loan on December 16?

A Yes, sir.

Q What reports did you make?

A Reports that reflect the interviews with Mr. Kaufman.

Q Are those all the reports you made in connection with your investigation?

A Yes, in that case.

MR. BARSANTI: I would like if we could get them, please.

THE COURT: I don't think you need those right now, Jack, to go ahead with this other part. You can get them ultimately. Go ahead with the other.

Q (By Mr. Barsanti) Well, all right, just so that it would be understood that I wouldn't be bound to not have further cross-examination of this witness.

THE COURT: Well, you will get it in time, but don't you want to interrogate him some more?

MR. BARSANTI: Excuse me.

Q (By Mr. Barsanti) Were all five persons present, the same five, throughout this interrogation of Harold [380] Kaufman?

A Yes. Initially when we first went into the room to talk, there were the three agents involved, and Chief Obertz came in, and since it was his department involved, he sat in during the interview, but more or less as an observer.

Q Were you in the room the entire time?

A I was out for a brief period.

Q How often?

A Maybe twice.

Q When Harold Kaufman left the Alton jail, did he leave in your custody?

A Yes, he did.

Q So you saw him the first time around 6:00 o'clock?

A We started talking with him just before 6:00; yes, sir.

Q What time did you arrive at the Alton Police Station?

A I arrived at the Alton Police Department at approximately 5:45.

Q Who did you talk to first?

A When I arrived, Kaufman was being processed, and in the process at that time, I believe, of being photographed, and I talked initially with Captain Petersen of the Alton Police Department.

[381] Q Did you have reason to suspect him of being the one who had robbed the Roosevelt Federal Savings and Loan at that time?

A Yes, sir.

Q In your interrogation of him with the other F.B.I. agents and with the Jennings police, of course, within furtherance of that suspicion and investigation?

A Yes, sir.

Q Now, did anybody else of the five, besides you, leave the room occasionally?

A I don't recall. One of them may have.

Q Was the Jennings Police Chief in the room all the time, to your knowledge?

A I believe that he was; yes.

Q You don't know of your own knowledge whether he did say something during the times that you may have been out of the room?

A No, sir.

Q Your testimony is while you were present, he didn't make any statement at all?

A Would you repeat this question?

Q Your testimony is that while you were present in the room, the Jennings Police Chief made no statements at all, had no conversations with Mr. Kaufman? He [382] merely observed you and your fellow F.B.I. agents interrogating him?

A He was observing. He may have asked an isolated question that he didn't hear the answer to, or he wasn't straight about that, he didn't understand it. But from the standpoint of question and answer; I was asking most of the questions, and Mr. Kaufman was supplying the answers.

Q Was Mr. Kaufman given the opportunity to call a lawyer during that period of time?

A At the initial stage of the interview, I told him that he could talk with an attorney of his choice at any time he wanted, and that he didn't have to talk to us if he didn't want to.

Q Did he talk to a lawyer some time that night?

A Yes, sir, he did.

Q When?

A He called an attorney in New York.

Q When, Mr. Peet?

A When?

Q What time?

A Between 8:40 and 9:30, I would guess. I don't know exactly what time.

Q Where did he make the call from?

A From our F.B.I. office in St. Louis.

Q After you brought him back to St. Louis?

[383] A Yes.

Q Did you tell him he could make that call after you got your confession?

A I told him that he could make the call any time he wanted to.

Q Was it before you started talking to him?

A Yes, sir.

Q And did he not ask to make that call at any time before you brought him back to St. Louis?

A No, sir.

Q Did he ask for any medical treatment at any time?

A At 6:15, I inquired of him if he would like to see a doctor, because I was concerned about the swollen lip and his apparent discomfort in the chair. At that time, he declined to see a doctor, and again, perhaps thirty minutes later, I made the same request of him, would he like to see a doctor, and in each case he declined.

Q You called a doctor in when you got him back to St. Louis, did you not?

A I personally did not.

Q Some member of the F.B.I. did?

A Yes, sir.

Q Who did that?

A I'm not sure who called.

[384] Q What time did the doctor arrive?

A During the short period that we were in the St. Louis F.B.I. office from, as I say, between 8:40 and perhaps 9:30 or 9:40.

Q Had Kaufman then requested a doctor?

A No, sir.

Q You don't know why a doctor was brought in at that time, do you?

A Yes. I was concerned, and Mr. Morley, our Assistant Agent in Charge, was concerned over the condition of his side, and I didn't know whether perhaps he had a cracked rib from hitting the steering wheel, or whether he had hit his hip on the arm rest of the car, and before taking him into jail we wanted to make certain that there was nothing physically wrong with him that would be injurious to him either there or at a later time.

Q You did not procure this examination before you got your confession though, even though you were concerned about his health?

A No.

Q That's correct from the time sequence, isn't it, sir?

A Yes, that's correct.

Q As I understand it, your testimony is there were [385] never any threats made by the Chief of the Jennings Police, to your knowledge? He may have asked an isolated question but you never heard him make any threats?

A No, sir.

Q And you afforded Mr. Kaufman the right to make a telephone call to an attorney at any time, which he did not avail himself of until you returned to St. Louis?

A That's right.

Q And the physical exam was procured by you after you returned to St. Louis?

A By a member of our office.

Q What time did you become acquainted with the possibility that there was a suspect in Alton that you should investigate for the Roosevelt Federal Savings and Loan robbery?

A It was some time after 5:00; probably between 5:15 and 5:40 in the afternoon.

Q By the way, when you arrived in Alton, was the Chief of the Jennings Police already there, or did he arrive later?

A He arrived shortly after we did.

Q Do you know when Mr. Kaufman was taken before a United States Commissioner?

A Yes, sir.

[386] Q What time?

A It was 11:00 A.M. the following morning, December 17.

Q How long did he remain in your office on the night of the 16th?

A We left the Alton Police Department at 6:00 o'clock, arrived at our office approximately 8:35 or 8:40, and while he was in the office from 8:40 until 9:40, a period of one hour, he was fingerprinted, photographs were taken of him, we sent out for food, which was brought in and was given to him, he made his telephone call to his attorney, and he was examined by the doctor.

Q After making that phone call,—excuse me. How late did this go then?

A At 9:40 P.M., Agent Walls and I took Mr. Kaufman down to the Central Station here and placed him in the St. Louis Police Department holdover jail to hold for the United States Marshal. He was booked there, as I recall, at 9:55 P.M.

Q Following the call he made to his attorney at around, I guess somewhere around the neighborhood of 9:00 o'clock, I guess, did he request a further opportunity to see an attorney, that you heard?

A On the 16th?

[387] Q Yes.

A No, sir.

Q Were you with him all the time from the time he was brought back until you deposited him in the Central Station, Central District?

A Almost all the time, except to go into another room and come back; almost continuously.

Q How many agents were present in the same room with him here in St. Louis?

A There may have been three or four.

Q Did he give you his correct name when you first saw him in Alton?

A He gave me his correct name; yes. He gave me Harold Kaufman.

Q Was that the same name he had given to the Alton police? Do you know?

A I believe that initially, as I understand it, he gave another name at the time of his arrest.

Q Had the Alton police interrogated him at all before you arrived there, to your knowledge?

A I believe not.

Q When they picked him up, they called you all?

A From a sequence standpoint while at the Roosevelt Savings and Loan, we understood that a red car had been [388] involved in a hit and run accident going north on Highway 67, and as assignments for investigation were being given out, Agent Walls and I were designated to go in a northerly direction, and it was shortly after we started that we heard over the radio that an individual had been arrested at Alton with a red car that had been involved in the hit and run. For that reason, we proceeded directly to Alton.

Q Do you normally follow up on hit and run accidents? Is this normal F.B.I. procedure?

A We follow up any logical lead that may result in the solution of a bank robbery, or any other investigation that we are conducting.

Q Did you have any thought or knowledge that this had been the vehicle, or any evidence this had been the vehicle that the robber had used? Something attracted you to it, Mr. Peet. You don't hear something about a hit and run man being picked up, and follow it up?

A The logical time sequence, and a highway going out of town as an escape route made it a logical thing to follow up.

Q You radioed ahead to the Alton Police that you were coming?

A No, sir, I did not.

Q You heard it on your radio, and you then proceeded [389] directly to Alton for the purpose of furthering this investigation?

A I was instructed by radio to proceed there; yes, sir.

Q At the time you arrived in Alton, was he being held for the F.B.I. at all, or was he being held on a traffic charge in Alton, to your knowledge?

A He was in the custody of the Alton Police Department at the time I arrived.

Q He was not being held for the F.B.I.?

A No, sir.

Q When you first saw him, did you inform him who you were and what you wanted to talk to him about?

A Yes, sir, I did. At the beginning of the interview I showed him my credentials and introduced him to each of the other members in the room.

Q Do you know whether his car had been searched at that time?

A I do not; no. I believe not.

Q What time did you get your confession?

A He completed his story of the day's happening at roughly 6:40 P.M.

Q What happened between 6:40 and 8:30, when you left Alton?

[390] A We left Alton at 8:00 o'clock. Between 6:40 and the time we left, right after 6:40 I was out of the room in order to talk with Assistant Agent in Charge Morley, relay the details as they had progressed to that point with him. He telephonically tried to contact Mr. Murrell in the United States Attorney's office, and was unable to, do so. He telephonically contacted Mr. FitzGibbon, the United States Attorney, and related the facts to him. It was at this time that Mr. FitzGibbon authorized Federal process against Kaufman. As soon as I had that knowledge, I returned and told Kaufman that Fed-

eral charges were going to be filed the following Monday before the United States Commissioner charging him with the robbery of the Roosevelt Savings and Loan Association. Then there was a slight delay while several witnesses to the robbery were being contacted and driven, or driving themselves to the Alton Police Department for purposes of a show-up where they could view the defendant to determine whether or not he was the individual who had committed the robbery. This took a little time, and as soon as that was concluded, and as soon as we could, we departed for St. Louis.

Q What time was he placed under arrest by the United States Government?

A I never said specifically, "Mr. Kauman, you are [391] under arrest." I did tell him that Federal charges were going to be filed, and that would be between 6:40 and 7:00 o'clock.

MR. BARSANTI: I have no further questions of this witness at this time, Your Honor. One last question, Mr. Peet. Did you inquire as to whether there was a United States Commissioner in the Alton area, before whom Mr. Kaufman could be taken? Did the F.B.I. make any attempt to locate a Commissioner at that time?

A We brought him back to St. Louis on the instructions of the United States Attorney.

QUESTIONS BY MR. MARTIN

Q Mr. Peet, I believe you said that you went before the United States Commissioner here in this District at 11:00 A.M. on December 17, 1963, with Mr. Kaufman?

A Yes, sir.

Q Now, the oral statement that he gave you on December 16, 1963, was that subsequently reduced to writing?

A Yes, sir, it was.

Q When was it reduced to writing, sir?

A On the afternoon of December 17.

Q And was that statement, was that statement which was reduced to writing, subsequently signed by Mr. Kaufman?

A Yes, sir.

[392] Q When was that signed?

A The afternoon of December 17.

Q That's after you had been to the Commissioner?

A Yes, sir.

MR. MARTIN: No further questions, Your Honor, as far as the foundation is concerned.

THE COURT: I want this off the record.

(Following a discussion off the record, Court was adjourned until Thursday morning, August 27, 1964, at 9:30 A.M., at which time the further following proceedings were had before the jury:)

THE COURT: Are you ready to proceed, Mr. Martin?

MR. MARTIN: Yes, Your Honor. I will call Agent Peet back.

GEORGE M. PEET,

having previously been sworn, resumed the witness stand and testified further in behalf of the government in rebuttal as follows:

DIRECT EXAMINATION (Continued)

BY MR. MARTIN:

Q Will you state your name, please, sir?

A George M. Peet.

Q And are you the same George M. Peet who was testifying at the recess of Court yesterday evening?

[393] A I am.

Q Sir, you understand that you are still under oath?

A Yes, sir.

Q Now, sir, yesterday I believe you testified that you saw the defendant, Harold Kaufman, on December 16, 1963?

A Yes, sir.

Q Where did you see him, sir?

A At the Alton, Illinois, Police Department.

Q And will you tell us who else was present, sir?

A At the time we were talking with Mr. Kaufman, there was Chief Obertz of the Jennings, Missouri, Police Department, Sgt. Zlotopolski of the Jennings Police Department, Special Agent Walls and Special Agent Hanes, both of the F.B.I.

Q Sir, about how long were you at the Alton Police Department while Harold Kaufman was there?

A From approximately 5:50 P.M. until 8:00, P.M. when we departed from Alton.

Q Now, sir, during the time that you were there, and the other gentlemen whom you have named were present, did you or any of them make any promises to Mr. Harold Kaufman?

A No, sir.

Q Did you, or any of the other persons present, make any threats toward Mr. Harold Kaufman?

A No, sir.

[394] Q Did you, or any of the other persons present, hold out any inducement for Mr. Kaufman to talk with you?

A No, sir.

MR. BARSANTI: If the Court please, I will object to this line of questioning as being outside of anything—there's been no foundation laid for it. Further, it is getting into an area where the questions are leading; not competent evidence for any matter before this Court at this time. We are getting into this area, statements were made back and forth. Any evidence on that we object to at this time.

THE COURT: I don't think that the question as propounded is objectionable. And even if it were an objection, it was late, so it is overruled.

MR. MARTIN: You may answer, Agent Peet.

A I thought that I did. Would you restate the question, please?

MR. MARTIN: Would the reporter read back, please?

THE COURT: Well, just read the answer.

(Thereupon, the answer was read by the reported, as follows:

A "No, sir.")

Q (By Mr. Martin) Were you able to observe his actions during the period of time when you were with [395] him in the Alton Police Department?

A Yes, sir.

Q Now, sir, can you tell us whether or not he was, appeared to you to be nervous at times, sir?

A He was slightly nervous; yes, sir.

Q Now, sir, will you tell us what, if anything, was giving him any nervous concern at that time?

A I believe that he was concerned over the fact that he had just been arrested. He was slightly nervous, I believe, and concerned over the fact that because of the automobile accident and the automobile hitting the tree he had damaged his lower lip, which was swollen, and he had hit his side. He appeared to be uncomfortable in the chair. He moved back and forth every once in awhile to ease that discomfort.

MR. BARSANTI: If the Court please, I move that a portion of that answer, other than the last part which described his apparent physical condition, be excluded. His answer apparently is what he thought the other man, Harold Kaufman, believed or felt. There is no foundation for that opinion.

THE COURT: It will be overruled. As I understand it, he responded on what he observed.

Q (By Mr. Martin) Now, sir, will you tell us what [396] were the subjects or topics of the conversation that you heard?

A The discussion centered primarily around Mr. Kaufman's activities of December 16th, and a few days before, beginning with activities in New York City, in Alton, Illinois, in St. Louis, Missouri, up until the time of his arrest, and our meeting at the Alton Police Department.

Q Now, sir, can you tell us whether or not it appeared to you that his conversation was logical or illogical?

A It was logical.

Q And, sir, can you tell us whether or not it appeared to you that his conversation was coherent?

A It was coherent.

Q Now, sir, were you able to understand the things that Mr. Kaufman related?

A Yes, sir.

Q Now, sir, from your observations of Mr. Kaufman during that period of time, and from the conversations of Mr. Kaufman that you heard, were you able to form an opinion as to whether or not Mr. Kaufman was sane or insane at that time?

MR. BARSANTI: If the Court please, I will object. There has been no foundation laid for that question. Before a non-expert witness can answer such there's got to [397] be a foundation of extensive observation laid.

THE COURT: I think he can answer as a layman on the basis of his observation over whatever period of time it was.

MR. BARSANTI: May we approach the bench on that, Your Honor?

THE COURT: Yes.

(Thereupon, a colloquy ensued among the Court and counsel, at the bench, out of the hearing of the jury and the reporter.)

MR. MARTIN: Your Honor, I will withdraw the last question.

THE COURT: Okay.

Q (By Mr. Martin) Sir, how long were you in the presence of Mr. Kaufman on December 16, 1963?

A All together from approximately 5:55 P.M. until 9:55 P.M., a period of four hours.

Q Now, sir, during that period of time, did you observe anything which, in your opinion, was unusual about the actions of Mr. Kaufman?

A No, sir.

Q Sir, will you tell us how he appeared to you?

A He was responsive to questions asked of him. He asked intelligent questions of those present, both at the [398] Alton Police Department, while we were en route from Alton to St. Louis, while we were in the St. Louis F.B.I. office, and also at the time he was being booked at the St. Louis Police Department holdover jail. His ques-

tions were intelligent, responsive, and to me, reflected considerable thought.

Q Now, sir, at that time, did he appear to you to be sane or insane?

MR. BARSANTI: If the Court please, again, the same objection to that question. There is no foundation laid.

THE COURT: Overruled. He may answer.

MR. MARTIN: You may answer, sir.

A Sane.

Q (By Mr. Martin) Did you subsequently talk to Mr. Kaufman on December 17, 1963?

A Yes, sir.

Q And where did you have that conversation with him, sir?

A In the City Jail here in St. Louis.

Q Was that before or after he went before the United States Commissioner?

A It was after he had appeared before the United States Commissioner.

Q Did you go with him to the United States Commissioner's office?

A Yes, sir.

Q And did you observe him in the United States Commissioner's office?

A Yes, sir.

Q Did you observe the proceedings in the United States Commissioner's office?

A I did.

Q Now, at that time, did you hear any conversation of anyone with Mr. Kaufman?

A I did.

Q Did you hear Mr. Kaufman say anything?

A Yes, I did.

Q About how long were you in the Commissioner's office, the proceedings in there, about what length of time, sir?

A I would imagine overall a period of ten or fifteen minutes at the most.

Q Will you tell us what you observed about Mr. Kaufman at that time?

A Mr. Kaufman came into the room, sat down, as he was instructed, in the chair designated for him. He listened attentively to statements made to him by the United States Commissioner. When asked if he understood these statements, he replied in the affirmative. He asked, I believe, one or two questions of the Commissioner for clarification. These questions appeared to be intelligent and on point with respect to his appearance at that time.

Q Now, sir, after leaving the United States Commissioner's office, I think you mentioned you saw him again in the City Jail?

A Well, actually on four other occasions.

Q Well, I mean on that same day, December 17th?

A Yes, sir.

Q About how long were you with him at that time, sir?

A I would imagine in the neighborhood of two hours.

Q Will you tell us what happened at that time, sir, if anything?

A Well, during that period, we discussed at length his activities beginning in New York about the 14th of December, his travel from there to Alton, Illinois, and on to the area of the River Roads Shopping Center, and into another shopping center area nearby.

MR. BARSANTI: Just a moment. May I interrupt? If the Court please, Mr. Peet is going into contents of these conversations. The conversations took place after Mr. Kaufman had been in touch with an attorney. They are completely outside of any evidence which can be presented in this Court. I object to any further testimony [401] along this line as to any contents of any statements made by Mr. Kaufman. He should not have been talking to him.

THE COURT: I think I am going to restrict you to conversations, and not the contents of them. Go ahead.

Q (By Mr. Martin) Mr. Peet, as I understand the ruling, Your Honor, if I am incorrect, let me know, please. I think the Court is restricting you to the subject matters that were discussed, not the things that were said. Is that correct, Your Honor.

THE COURT: Well, I think generally about conversations, and rather than contents of conversations, on what his responses were. Interrogations about his activities on certain days, and then he responded. Go ahead.

THE WITNESS: He, in my discussion with him, discussed his activities of December 16. He discussed some of his background activities as to his concern over matters affecting him.

MR. BARSANTI: If the Court please, the same objection again. Mr. ~~But~~ is going into contents of these conversations.

THE COURT: I don't think—this is certainly in such general terms, and if it gets particular, I will, with or without an objection, I will strike it.

Q (By Mr. Martin) You may complete your answer, sir.

[402] A We discussed matters over which he was concerned affecting him in New York City. We discussed matters in which he was concerned involving his activities in Indiana and in Pennsylvania. We discussed his activities with respect to Pat Scott, his girlfriend, some of her background, her associates, his associates, and many of the problems that he faced at that particular time.

Q Now, sir, part of this discussion was in the form of questions and answers?

A Yes, sir.

Q Was he responsive to the questions that were asked him?

A Yes, sir, he was.

Q Was his conversation and discussion logical or illogical?

A It was logical in every respect.

Q Was his discussion and conversation coherent or incoherent?

A It was coherent.

Q Did he appear to be nervous in any manner?

A No, not overly nervous at all.

Q Now, sir, were you able to observe whether or not there had been a change in Mr. Kaufman from the previous evening when you had seen him?

[403] A The only noticeable change was a slight change in his physical condition I referred to of his lips and his side.

Q Now, sir, on how many other occasions did you converse with Mr. Kaufman?

A Four other occasions.

Q Will you tell us when those occasions were?

A On December 18, on December 20, on January 24, and on January 27.

Q Now, sir, all together, well, can you tell us how long on each one of those occasions you were in his presence and had conversations with him?

A I think probably—

MR. BARSANTI: Excuse me just a minute. If the Court please, might I have just a moment?

THE COURT: Sure.

MR. BARSANTI: The Court file. If the Court please, we will object to that question of any contacts Mr. Peet may have had with this defendant. Defendant had counsel. These contacts were without the consent of counsel, were not right, and he had no business making them of any kind. He should not have been talking to him.

MR. MARTIN: If the Court please, it is the government's position that the agent had talked to him. How-
[404] ever, we are not going into the conversation, the subject matter. Counsel's objection possibly might go to the point of excluding what was said during the course of the conversations. However, that would not go to the point of ruling out any observations which the agent might have had of the defendant at that time. In other words—

THE COURT: I know what your point is.

MR. MARTIN: Thank you.

• MR. BARSANTI: It is clear the government is trying to use the contact for evidence in some sense. The contacts were improper. They should not have happened. They cannot be used for any evidence.

THE COURT: They are not being used for evidence of the charge. They are used as rebuttal to the defense.

MR. BARSANTI: If the Court please, it becomes all of the government's case once that issue is in. It comes in in procedural rebuttal. It doesn't make any difference.

They can't go do something they are not permitted to do, and then turn around and use it.

THE COURT: I will overrule the objection.

Q (By Mr. Martin) Mr. Peet, on December 18, how long were you in Mr. Kaufman's presence?

A I would guess in the neighborhood of an hour to two hours.

[405] Q And did you hear any conversation at that time?

A Yes, sir.

Q Were you able to observe him at that time?

A Yes, sir.

Q What was the next date that you were in his presence?

A On December 20th.

Q Did you have any conversation with him at that time?

A Yes, sir.

Q Were you able to observe him?

A Yes, sir.

Q And when was the next time—How long? Did you tell me how long you were there December 20th?

A December 20th I would guess again in the neighborhood of, oh, an hour.

Q When was the next time you were in his presence?

A I did not see Mr. Kaufman again until January 24th, when he requested to see me.

Q You say he requested to see you on January 24th?

A Yes, sir.

Q Did you see him?

A Yes, sir.

Q And how long were you in his presence?

A Approximately forty-five minutes on that occasion.

[406] Q And did you see him again?

A Yes, sir, on January 27th.

Q And about how long were you in his presence at that time?

A I would guess again in the neighborhood of an hour to an hour and a half.

Q And on these last two occasions, you had conversations with him?

A Yes, sir.

Q Were you able to observe him?

A Yes, sir.

Q Now, sir, on these subsequent occasions from December 18 to January 27, on each of those occasions when you saw him, will you tell us whether or not you observed anything about him which was different than what you observed on December 16, 1963?

A In connection with any discussions that I had with him, I saw no change in the way he asked questions, the way he answered questions, the apparent deep thinking processes he was going through in connection with the problems that faced him at that present time.

MR. MARTIN: No further questions.

CROSS-EXAMINATION

BY MR. BARSANTI:

Q Mr. Peet, you filed reports on all of your activities [407] in connection with what you testified about?

THE COURT: Give Mr. Barsanti those reports. Let the record show that the Court has directed the District Attorney to give Agent Peet's reports to various meetings. It is going to take you five or ten minutes to read those, Mr. Barsanti, so I will let the jury go out and sit back there. As soon as you have looked at them, will you let me know so I can come back?

MR. BARSANTI: Yes, sir.

(Following a brief recess, Agent Peet resumed the witness stand, and the further following proceedings were had:)

THE COURT: Are you ready, Mr. Barsanti?

MR. BARSANTI: Yes, Your Honor.

Q (By Mr. Barsanti) Mr. Peet, you have testified that you had some contact with the defendant, Harold Kaufman, on a number of different occasions, 16th, 17th, 18th, 20th of December, January 24, January 27. You indicated that there was some concern about a Pat Scott; is that correct?

A Yes, sir.

Q Was this on more than one occasion?

A Yes, he mentioned it on more than one occasion.

Q Do you have a medical degree?

A No, sir.

[408] MR. BARSANTI: I have no further questions.

THE COURT: All right. Anything else?

MR. MARTIN: No further questions.

THE COURT: All right. Thank you. You may step down.

* * * * *

[410] FRANKLIN J. WALLS,

being first duly sworn, testified in behalf of the government in rebuttal as follows:

DIRECT EXAMINATION

BY MR. MARTIN:

Q State your name, please, sir.

A Franklin J. Walls.

Q Mr. Walls, what is your business or occupation?

A I am a Special Agent of the Federal Bureau of Investigation.

Q How long have you been with the Federal Bureau of Investigation?

A Approximately fourteen years.

Q To what office were you assigned on December 16, 1963?

A St. Louis, Missouri.

Q On that date, did you have occasion to participate and assist in the investigation of the robbery of the Roose-

[411]velt Federal Savings and Loan Association, located in the River Roads Shopping Center, in St. Louis County?

A Yes, sir.

Q During the course of that investigation did you have occasion to see the defendant, Harold Kaufman?

A Yes, sir.

Q Will you point him out to us, please, sir?

A He is the third gentleman directly ahead of me.

Q Seated at the table?

A Yes, sir.

MR. MARTIN: If the Court please, may the record show the witness is indicating the defendant?

THE COURT: The record will so show.

Q (By Mr. Martin) When did you first see Mr. Kaufman?

A It was at the Alton, Illinois, Police Department.

Q What date, sir?

A On December 16, 1963.

Q Can you tell us approximately what time it was that you first saw him?

A It was approximately 5:55 or 6:00 P.M.

Q Do you recall who, if anyone else, was present at that time?

A Yes, sir. Special Agent George Peet and I had gone [412] to the Alton Police Department and we were together at the time we initially saw the defendant.

Q How long were you with him at the Alton Police Department?

A Approximately from about 6:00 o'clock until about 8:00 or 8:30.

Q Did anyone come in while you were there?

A Yes, sir. There were two officers from the Jennings Police Department, namely Chief John Obertz and Lt. Zlotopolski, and also Special Agent from the Alton, Illinois, area, Bob Hanes was also there.

Q All right, sir. Will you tell us about how long you remained in the presence of Mr. Kaufman while you were at the Alton Police Department?

A Well, from the time that I initially got there until we left at around 8:30 P.M.

Q And where did you go when you left the Alton Police Department?

A We came to the St. Louis office of the F.B.I.

Q Was Mr. Kaufman with you at that time?

A Yes, sir.

Q While you were in the St. Louis office of the F.B.I., how long were you in Mr. Kaufman's presence?

A Well, the entire time he was there, until about 9:30,

[413] 9:45; something like that.

Q Now, sir, referring back to the time that you were in the Alton Police Station, did you hear any conversations with Mr. Kaufman?

A Yes, sir.

Q And did you hear Mr. Kaufman participate in any conversations?

A Yes, sir.

Q Sir, without telling us what Mr. Kaufman said, will you tell us the subjects that were discussed?

MR. BARSANTI: Just a minute. If the Court please, I renew the same objection that's been made before. There's been testimony concerning the subject matter of these discussions that may go beyond physical observation of the witness.

THE COURT: I am going to sustain the objection, except generally they may discuss, he may state what the subjects were, and members of the jury, I want to advise you at this time that it may be necessary for me to strike some testimony. If it is, you are not to consider it at all at the time that you deliberate. Now, I don't know that it will be, but if it ever becomes necessary, as I told you in the general charge earlier, if the Court ever strikes testimony and orders it stricken from the record, you are [414] not to consider it at the time of your deliberation.

MR. MARTIN: You may answer, sir. But are you clear as to the question and the restrictions by the Court on your answer?

THE WITNESS: I think so. As I recall, Mr. Kaufman made reference to the fact that he was in trouble in New York.

MR. BARSANTI: If the Court please, my objection goes to that type of conversation.

THE COURT: Yes. It will be sustained.

MR. BARSANTI: And I will ask that it be stricken.

THE COURT: It will be stricken.

Q (By Mr. Martin) Sir, was there any discussion about Mr. Kaufman's activities prior to his arrival in St. Louis?

A Yes, sir.

Q Was this more or less in question and answer form?

A Well, if I recall right, an effort was made to determine his activities for that date prior to beginning that—Mr. Kaufman did make reference to prior activity.

MR. BARSANTI: If the Court please, I will move that the latter portion be stricken as to what Mr. Kaufman made reference to.

THE COURT: No. I think this is generally enough [415] to—so I will overrule the objection.

MR. BARSANTI: All right.

Q (By Mr. Martin) Now, sir, in the discussion of prior activities, were the responses made by Mr. Kaufman to questions logical or illogical?

A They were logical.

Q Were they coherent?

A Yes, sir.

Q Were they in detail?

A Yes, sir.

Q Now, sir, I'll refer to the events of the day of December 16, 1963. Were those events discussed?

A Yes, sir.

MR. BARSANTI: If the Court please, I will object to this.

THE COURT: It will be sustained as to the question and the answer, and both will be stricken.

Q (By Mr. Martin) Was a discussion about December 16, 1963—

MR. BARSANTI: If the Court please, I will object to that.

THE COURT: You may answer that question.

THE WITNESS: Would you repeat the question, please?

Q (By Mr. Martin) Was there a discussion about [416] December 16, 1963?

A Yes, sir.

Q Did you hear questions being asked of Mr. Kaufman?

A Yes, sir.

Q Did you hear answers given by Mr. Kaufman?

A Yes, sir.

Q Did Mr. Kaufman's answers appear logical or illogical?

A They appeared logical to me.

Q Did they appear to you to be coherent or incoherent?

A They appeared to be coherent.

Q Were they in detail?

A Yes, sir.

Q Were you able to observe whether or not Mr. Kaufman appeared to you to be nervous, or not to be nervous?

A In my opinion, he was—he appeared to be slightly nervous.

Q Sir, was there any indication as to what was causing his nervousness as of that time?

A Well, it was my understanding that he had sustained an accident with an automobile, which had caused a cut on his lip, plus the fact that he had appeared at the police station in connection with that.

Q Sir, can you tell us what, if anything else, you [417] observed about Mr. Kaufman and his actions as of that date, at that time?

A Well, he appeared to be responsive to the questions that were asked him. His answers appeared to be intelligent answers as if he were trying to explain his activities.

Q Now, sir, after you left the Alton Police Department with Mr. Kaufman, were you together at that time?

A At the time we left the Alton Police Department, I was with Mr. Kaufman; yes, sir.

Q In the same automobile?

A In the same automobile; yes.

Q And who, if anyone else, was in that automobile?

A Special Agent George Peet and the Assistant Special Agent in Charge, Donald Morley.

Q Did all of you ride together back to the St. Louis office of the Federal Bureau of Investigation?

A Yes, sir.

Q And during that time were you able to observe Mr. Kaufman?

A If I might explain, I was driving the automobile in the front seat alone, and Mr. Kaufman was in the rear

seat between Mr. Morley and Mr. Peet. I was able to observe him in the back seat as I was driving, by referring to the inside rear view mirror.

[418] Q Did you hear any conversation at that time?

A No, sir, I didn't.

Q Now, sir, what happened after you arrived at the Federal Bureau of Investigation office here in St. Louis, Missouri?

A Well, upon our arrival at the St. Louis office, we processed him. That is, by fingerprinting him and taking his picture, and then in view of the injury or cut on his lip, we summoned a doctor to come and examine him.

Q What about food, sir?

A He was given food while he was here—I mean at the office, of his own choice.

Q Now, sir, did Mr. Kaufman give you any difficulty in the processing of him at the office?

A No, sir.

Q He cooperated in the taking of the photographs and the fingerprinting?

A Yes, sir.

Q About how long was he in the office?

A I could estimate approximately some forty-five minutes to an hour.

Q And did I ask you what time it was that you first saw him in Alton on December 16, 1963?

A Yes, you did. It was approximately 5:55 or 6:00 P.M.

[419] Q Now, after he arrived at the F.B.I. office here in St. Louis, will you tell us what, if anything, you observed about his nervous condition?

A Well, he did not appear to be very nervous on his arrival in our office. He appeared to be still in the frame of mind of trying to answer questions and to assist in the events of that day.

Q Now, sir, from the time—strike that, please. Where did Mr. Kaufman go, or where was he taken after he was in your office?

A He was taken to the St. Louis Police Department, where he was turned over to their custody.

Q Now, sir, from the time that you observed him in Alton until the time that he left your office, did you observe anything about Mr. Kaufman, or of his actions, which appeared to you to be unusual?

A No, sir.

MR. BARSANTI: If the Court please, I will object to the question as being vague.

THE COURT: No. He may answer.

THE WITNESS: No, sir.

Q (By Mr. Martin) Now, sir, can you tell us whether or not Mr. Kaufman, at that time appeared to you to be sane or insane?

[420] MR. BARSANTI: If the Court please, I will object to that question. There is no foundation laid of detailed extensive observations for some period of time by this witness to answer that question, that is required for a lay witness.

THE COURT: I will let him answer it. It will be overruled.

MR. MARTIN: You may answer, sir.

THE WITNESS: Yes, he appeared sane.

Q (By Mr. Martin) Now, sir, will you tell us the basis for that opinion?

A Well, on the basis of my fourteen years' experience as a special agent of the F.B.I., the man appeared to be sane.

* * * *

[437] CLOSING ARGUMENT IN BEHALF OF THE GOVERNMENT

MR. MARTIN: May it please the Court, gentlemen of the defense, Madam and gentlemen of the jury: At this point, we have come to the closing arguments which the Court mentioned to you in the general instructions that were given to you Monday. But before starting into the closing argument, I would like to thank you on behalf of [438] the Government for your attendance here, and I noticed that you have been very attentive and that you have heard all the evidence, and it is appreciated by the Government.

As counsel for the Government, I have the opportunity of giving you the first closing argument. We both, Mr. Barsanti and I, will have the same amount of time. Mine will be divided in half. I will open, Mr. Barsanti will give you the closing argument on behalf of the defendant, and then I will have time to answer some of the things that he might tell you.

Now, at this time, I might mention to you something that the Court said in its original instructions Monday morning, that what I might say to you now, what the opposing counsel might say to you should not be taken as evidence, but is our version of what the testimony and the evidence has been, and you should take it as such and use it for whatever assistance it might be to you in the course of your deliberations.

At the beginning of the case, I mentioned to you what the charge was that had been brought against the defendant by means of the indictment, which I will read to you again, and it reads in substance as follows:

"That on or about the 16th day of December, 1963, in St. Louis County, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri, [439] Harold Kaufman, the defendant, did, by force and violence, and by intimidation, take from the presence of another, to wit, Lloyd A. Woollen, Manager of the Roosevelt Federal Savings and Loan Association, certain money, to wit, the sum of three hundred twenty-eight dollars and fifty cents, more or less, in lawful money of the United States, belonging to, and in the care, custody, control, management and possession of said Roosevelt Federal Savings and Loan Association, a Federal savings and loan association authorized and acting under the laws of the United States, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; that in committing the above offense, he, the said defendant, did put in jeopardy the life of the said Lloyd A. Woollen by the use of a dangerous weapon and device."

Now, that is the charge which the government has proven to you. As a matter of fact, you recall the opening statement of the defense counsel, and the other events of the trial which indicate that the defendant does not

contest the fact that he committed the act alleged in the indictment. The only issue now remaining in the case is whether or not the defendant was legally sane, legally responsible for his criminal act on that date.

Having admitted the commission of the crime, ordinarily I would not have to go into the details of the acts [440] which he committed at that time, but, however, on the question of sanity, and I would like to bring this to you and remind you it's a question of his sanity on December 16, 1963. Was he legally sane on that date? That is the question for you to determine. You may consider all of the evidence which has been introduced, but you come right back to the focal point, was he legally sane and criminally responsible for his act on December 16, 1963?

In order to determine that, you must examine what he did, how he did it, what were his actions, what was his condition at that time. You may also consider acts previously, and acts after December 16, but you come right back to the point of what was his condition on December 16, 1963.

Now, we have introduced evidence showing that the automobile he was driving on December 16, 1963, came from New York. Here is Exhibit 8, the Rental Contract for that automobile in the name of Arthur Cooper. Here is a traffic ticket, City of New York, showing that the automobile was in New York City. I am trying to find the date on this ticket. I had it at one time—on December 14 of 1963. We showed you receipts for gasoline along the route between New York to St. Louis. We have here a receipt from the Western Union showing telegraphing of the money from Harrisburg, Pennsylvania, to New York City, to Mrs. Patricia Scott, on December 15th.

These are some of the things showing what he was doing when he was coming from New York to St. Louis in this automobile, and when he gets to the vicinity of St. Louis, he stops in Alton, Illinois, and he uses the name Arthur Cooper, the same name that is on the rental contract, for the purpose of purchasing a revolver which was registered in the name of Arthur Cooper with the gun sales company.

At that time he displayed no nervousness. His conversations with the salesman at the time he was making that purchase appeared to the salesman to be perfectly normal. I think there was some testimony that he was purchasing it for the purpose of a gift to his son, but all of that activity so far seems perfectly normal.

And this is the gun which he bought in Alton, showing that he had the purpose of committing a robbery some time along the route. And if you recall the testimony of Patricia Scott, she said that he left New York for the purposes of "pulling a job" was her terminology. She thought he was flying, but, however, he was driving the automobile and got to Alton, he purchases the gun, he goes to the Roosevelt Federal Savings and Loan Association in the River Roads Shopping Center, and what does he do there?

He goes to Mr. Lorenz, one of the tellers. He talks perfectly coherent, logical, to her about the purchase of [442] Travelers' Checks, offers to buy the Travelers' Checks with a personal check of his own. When that is refused, he continues his conversation and starts to talk about a G.I. loan, at which time he is then in conversation, or gets into conversation with Mr. Lloyd Woollen. And he discusses the loan, mentions the fact that he is from out of town, has been recently transferred here by an employer, the Western Electric Company; that he's transferred from Pittsburgh, and that he wants to get a loan. He has the G.I. approval, all of which would be perfectly normal, a perfectly normal story for anyone who had come from out of the state and been transferred by his employer here.

Then he discusses the opening of a savings account and during that discussion he pulls the gun and demands the money. Now, when he pulls the gun and demands the money, does he show any nervous excitement, agitation, any of that? Mr. Woollen said no. Apparently he was cool, calm and collected, and I would say that he was, at that time, displaying the cool, calmness and the regular attitude and activities of a professional robber.

He demands the money, he goes to the window, and Mr. Woollen has given him the money, and he takes these two

packages of Travelers' Checks. Along about this time, a woman customer enters the savings and loan association office and shortly after the woman enters, Mr. Dedert and [443] his family enter, and up to that point the defendant has shown no nervousness whatsoever, and his only concern at that point was that he did not want the children, the three children, to get hurt.

And what does he do? He calmly directs them to an office in the back, which any ordinary robber would do. They go to this office that has plate glass windows on the outside. He recognizes that people on the outside could see him and what was going on, so he directs them to a supply room, all of which would be the normal activity of a robber. And he does not show any hurriedness in his movements until the Dedert family comes in, and naturally, now, we have Mr. and Mrs. Dedert, the three children, and the lady customer, along with the two employees of the loan association. And what would the normal robber do at that point?

It is beginning to get crowded in the office, and it is time to get out. I have the money and I have the Travelers' Checks, and it is time to get out, and you are rushing to get out, and that is the only display of nervousness seen at that time.

But I call to your attention one factor, that twice he made the statement, "I don't want the children to get hurt," which indicates an element of normalcy. In other words, any normal individual would not want children to [444] get hurt. It shows that he is concerned. He knows what he is doing at that time. He knows the possibilities. It shows that he was completely in his faculties at that time.

He then leaves. He goes to the highway leading to Alton, Illinois, and some of you possibly live in that area or that section of the county, or have traveled that road, and I say to you that as jurors you can make use of your own knowledge of general information, and when you are deliberating whatever knowledge you have of general information you don't necessarily have to leave that outside of the jury room but decide the case only on the evidence which you have heard.

He goes to Alton as an escape route. Unfortunately, he has a slight accident on the way. The Alton police are alerted to look for a hit and run driver, and they intercept him as he enters Alton. He does not stop when signaled, and he has an accident then. He talks to the police officer. He talks to him logically, coherently, gives him the information, though it is false information, about his name. He is taken to the police station. He is there for a number of hours, and he talks to various officers and agents. He does everything logically as you would expect any normal individual to do it.

Now, in determining his condition as of that date, you have heard the testimony as to what he did and how he [445] did it. You use that testimony to assist you in determining how he was on that day. No medical person examined him on that date, so we have to rely upon the testimony of witnesses to establish his condition as of that date.

The only one that could possibly give, or attempt to give any opinion as to his condition on that date was Dr. Waitzel, and Dr. Waitzel examined him December 30th, of 1960, approximately three years before the happenings of this particular crime. At that time, he merely found that he was psychoneurotic. He was not a psycho, as they term it, but merely psychoneurotic, which is a nervous individual, and nervous individuals are responsible for their crimes, though there was very little of any display of nervousness on December 16, 1963.

Now, that is the question, the question of sanity, and I ask you to determine the question of sanity as of December 16, 1963, and when you consider all the evidence which has been introduced as to his history before and after December 16, along with his activities on December 16, I am sure that you will find that he was responsible for his acts, he knew what he was doing, he could have refrained from doing it if he had so desired, and that you will conclude that he is criminally responsible for the robbery.

I will conclude this portion of my argument, but I want to thank you for your attention so far, and I will be back

[446] in a few minutes after Mr. Barsanti has concluded his. Thank you.

CLOSING ARGUMENT IN BEHALF OF THE DEFENDANT

THE COURT: Go ahead, Mr. Barsanti.

MR. BARSANTI: If the Court please, Mrs. Goodhead, and gentlemen of the jury: As Mr. Martin has told you, he has just given you his interpretation, consensus, his view of what the evidence has shown. We will now do that on behalf of the defendant, Harold Kaufman, and when we conclude, you will have received the contentions. Mr. Martin will have the opportunity to give you a contrary view of what I say and then you will have before you all material which is going to be utilized with the evidence. Of course, you are free to use anything that you heard in the course of this trial, in addition to your own common knowledge.

Mr. Martin did not mention to you, did not remind you, well, that it is the government's duty, the government's burden to prove to you beyond a reasonable doubt that Harold Kaufman was sane on December 16, 1963. We don't have to prove that he was insane. The government must prove to you that he was sane. If they fail to do so, the verdict must be not guilty.

Now, what do we know about December 16th? We know Harold Kaufman held up the Roosevelt Federal Savings and Loan Association. We know that on that [447] date he was mentally ill and sick. What we do not know for sure, and this is your function, is how sick, and, as with so many things in life, we have to take what we can gather from other sources to make that determination upon.

Now, really, we know quite a bit about this mental condition. A lot can be reconstructed. A lot of material is before you. We know that Harold Kaufman begins with a schizoid personality in his childhood. This was confirmed by Dr. Waitzel, Dr. Weiland, the government psychiatrist. A schizoid personality in your childhood does

not mean you will at some later date become psychotic, but it does condition the personality, constitute the type of person that when the psychotic condition does come, if it does, schizophrenia is the mental disease which results.

We know that in late 1960 Harold Kaufman is found to be psychoneurotic (severe), a very low tolerance to anxiety, a low emotional stability; not psychotic—Mr. Martin is right—but close.

We know that in February and March of 1964 after the incident, Harold Kaufman is psychotic, schizophrenic reaction, paranoid type. Now, we have a period in there, the day in question falls within that period. When did he go over the line, or was he over it all the time? This we cannot know precisely but we also have some thoughts as evidence on this.

[448] The government psychiatrist from Federal Medical Center, while they could not say for sure the condition on December 16th, it was a reasonable medical expectation that his condition was more severe on December 16 than when they examined him, after being in an institutional setting. It was Dr. Waitzel's opinion, based upon his prior examination and the condition he found Kaufman in at that time, and based upon the testimony indicating the stress and the strain, that the later psychotic condition was consistent, and that on December 16th, this man could not control his actions. He could not have a will which could control that body. This was a man that is insane in the legal sense of the word.

You heard testimony as to a condition from the government psychiatrist, a diagnosis of partial, rather stable remission. That was explained. That didn't mean cured, that meant that there had been an improvement from a more severe state. At some time before that February and March it had been more severe. As Dr. Weiland put it, there had been some integration from a previous point when there had been a loss of touch with reality. At that stage he had some reality integration, but Dr. Weiland also said that you couldn't tell whether this would hold outside of an institutional setting. If you put him into the stress and strain again, the integration might break [449] down. He might regress. So we do know in this

period somewhere he was much more severe than even a psychotic state found in January and February.

There were two lay witnesses, Pat Scott and Sgt. Joe Kiernan, both with extensive contacts, experience and observation of Harold Kaufman. Pat Scott, in her lay testimony did not think that he was sane. Sgt. Kiernan didn't know. He couldn't say. He found him more unusual, more bizarre, more abnormal than the people he was used to dealing with, and you have got to remember he's dealing with the criminal element on a constant basis, people normally who are below what we find in an average or norm. Harold Kaufman went beyond that.

Now, what do we know about this disease Harold Kaufman has, this mental illness? We know that it begins, it has its basis in a schizoid personality. We know that the paranoid type usually manifests itself when a man, a woman starts getting in the age range of thirty-five to forty. This is the age range Harold Kaufman had just gone through. We know that, unlike some other mental illnesses, the intellect is not impaired. Changes can be schizophrenic, paranoid type. The person is still able to reason in this peculiar illness. He is not rendered conspicuous, so that walking down the street anyone can point and say there is a schizophrenic paranoid. That [450] doesn't mean that he is in control of his actions.

One of the characteristics though is the inappropriateness of response, as called the affect of inappropriateness, the wrong emotional response, the wrong manifestation at the time, the laugh at the funeral, that was used as an example. But we do know when that psychotic state is severe enough, even though the intellect is not impaired, even though because of the paranoid type the person is still capable of detailed planning, that the will has been destroyed. There is no control. The actions are beyond the control of the mind. What is happening is a sick and deranged something which we are not able to get into as yet, that is guiding a physical body but is not a sane will.

We have evidence that was presented to you of his activities for the month preceding December 16th. This bizarre relationship with Pat Scott, bizarre companions,

a marriage proposal by Harold Kaufman to this woman the first night he met her, constant attempts to receive affection from her to gain some self-esteem, that you recall. The lack of reality and the lack of identity of himself as a person is a strong characteristic of this mental illness disease. Striving throughout this period to buy the affection of Pat Scott, when actually she is making fun of him and taking him for the dollars that she can, [451] his assertion, "I am responsible for you," even when she says, "Forget it."

But the one bright spot in the whole thing, and that was the acceptance of the affection of the children. They apparently could accept him, but Pat Scott was taunting him. The other associates were taunting him. Pat's flunky. Who are you? A sick man, being used. Pat Scott, saying, "You put ten thousand dollars down on the table and I'll marry you." Here's a man in his drive to try to get some affection, some love which has been lacking in his childhood, a childhood deprived emotionally, trying to buy it, trying to do anything, driven to it by an internal stress.

We cannot get inside a man and determine how intense, how terrific it is. We know what stress can do to each one of us though. We experience it but we have the defense mechanism to protect ourself and to come back, but with the suffering from this illness, from this disease, this defense mechanism isn't there. That stress and that strain cannot be controlled. The actions go on without control, without restraint. There is no will. There is no mind to control it.

We know of these stormy episodes with Pat Scott when he would be in fear of losing a love object, and the hundred and eighty degree turn in the manifestation of emotions like that (snapping fingers) when he was being [452] deprived of his love object. Delusions as to greatness, of a great criminal wanted all over the country, putting on bizarre costumes. "I am the great Bobby McGill," who was his, apparently his idol. The paranoid delusions of people following him everywhere. The New York Police being interested in him not at all for one short period. They happen to have contact with him be-

cause he made contact with Jack Keller. They are not following him, but the police are down on the corner all the time.

These are all internal pressures that are working on him, these stresses. We add to this the external pressure, the episode situation with Jack Keller when there is a real belief on the part of Harold Kaufman that his life had been put on the line. Detective Kiernan testified about when they arrested him in the phone booth, and Kaufman thought that was it that moment, that he was getting ready to be shot and killed, and Sgt. Kiernan confirmed for you that, real or imaginary, such things as contracts and that type of people involved are enough to worry about in the City of New York. So you have another external pressure.

You have then cooperating with the police, becoming an informant, and as the prosecution brought out, a very dangerous venture. Further external pressure.

Remember, the cooperation is conditioned upon Pat Scott. She has to be protected. He is still being driven [453] by that internal pressure throughout.

Other episodes described by Kiernan. It is a bizarre situation in the bar, public telephone, bragging about the crimes. He bragged about them to everybody. He had to make himself somebody. This drive to become a human being, person.

What do we know about the 16th precisely? Fortunately, not a whole lot right on that day, but we do know that everything leading up to the 16th, and everything on the 16th is absolutely consistent 100 per cent with his psychotic condition, with mental illness, with a schizophrenic reaction, paranoid type.

Let's look at it. The government has reiterated to you and pointed to you the condition of calmness, lack of nervousness, rationality and coherence on the 16th. We have a man who can't drive an automobile well-participating in an armed robbery, in a holdup, in one automobile accident, the subject of a police chase, an accident with a tree, long interrogation by the Alton Police, the Jennings Police, and the F.B.I., while injured, and he is rational, he is calm, he is unemotional.

Is this a normal reaction, or is this not the effect of inappropriateness which goes with this disease? This is not the time when you are calm or rational. Other times he was nervous, he was incoherent. This was his normal [454] way when Pat Scott or Kiernan would see him. Most of the time he was, but here, suddenly he isn't at all. What could be more consistent with what was explained to you, and never contradicted, as to a characteristic of this disease?

I submit to you that the government has not proven anything on the question before you, except to reinforce proof that Harold Kaufman was, legally insane and that he could not control his actions on December 16th.

There is not one bit of evidence in here which would go to show sanity on behalf of Harold Kaufman on that date. To the contrary, it all goes the other direction. We don't have the burden of proving insanity. The government has the burden of proving sanity, and we have probably come closer to carrying that burden the other direction than they have. There is not merely a reasonable doubt, there is a large substantial doubt as to whether this man was sane on December 16th. There is no question he was sick. There is no question but that he was under stress and he was under strain, and whether it's a stress or a strain that you or I should accept or feel is important, the question is what was it doing to this sick mind? How was it manifesting itself inside there, on top of this external pressure?

I'll say to you that if you would find Harold Kaufman not guilty you would have no trouble sleeping at night, any trouble with your conscience. This is a man who is [455] engaged in activity with which you are familiar, which society doesn't tolerate. It is not meeting with the moral code, and on first blush you know it would seem to make no difference to anybody but Harold Kaufman here; no impact upon a community; no impact upon our country; and yet is this really true? What makes this country a great country? Is the exciting program in space so spectacular which excites us, which is a marvelous development? Is it the abundance of foodstuff which we have heard of before in the world? The abundance of

worldly goods we are able to enjoy through our modern managed salesmanship? Our great business institutions or great power capacity to keep the wheels of industry going? Is it a combination of those? I don't think so. Those are only manifestations that are possible because this country has some basic principles. And that falls back on probably one fundamental principle. It is a simple one, as most great things are. That is a deep, abiding conviction and respect for the rights of the individual under all circumstances, and is this deep principle which always keeps us in this country somewhat on course.

Events will happen where that principle seems to be negated, but we eventually right ourselves, just as a ship does which is well built and well maintained, even though the waves appear sometimes to have control, but that principle of deep, abiding belief in the fundamental rights [456] of the individual requires some constant vigilance, just as that ship which is well built in the beginning must constantly be well maintained if it is going to survive.

Probably more often than any other place, a courtroom such as this one is where we have the opportunity to reinforce this basic principle, and more particularly, in a courtroom trying a criminal case, and even more specifically in a trial involving someone like Harold Kaufman. We sum up what we do in the course of that trial, what we have been doing here these last few days, as doing justice. Justice is to be done. If we do it well, if we perform justice, if justice has been done, we have enforced the basic concept which is so vital to every one of us, so vital, so taken for granted. We have enforced it. We have done our job.

I am not suggesting to you if there was a miscarriage of justice in this case, a failure of justice, that the future of this country is in danger. That would be absurd. But this is one trial out of many that is taking place around this country today, next week, the week after, the year after, and unless the greatest effort is put forth in every one of these to make sure that justice is served to the fullest extent, we do impair that liberty, that freedom of the individual which is so important, and history has

taught us well that once lost it is awfully difficult to ever [457] regain.

Now, in this case, we have Harold Kaufman, not from our area, from some other area, a man that you find difficult to admire, a man you are not going to feel sorry for. I can make no plea to you of mercy or sending this man back to a family. These things don't exist for Harold Kaufman. I can talk to you though in the terms of this justice, and I have an absolute right to do that, and Harold Kaufman sitting here, regardless of what you think of him or what anybody thinks of him, has that absolute right to expect justice, to expect that this trial will determine his guilt on the one offense charged. It will not be guided or governed, influenced by his other conduct at other times. It will not be governed by how repulsive he may be, or what he may have done, or the people with whom he has associated, or other activities in which he has engaged.

It must be decided on the specific evidence and we are talking about a sole issue, the specific evidence as to his mental competency, his sanity or insanity legally on December 16, 1963. If within that context, and only within that context, you find that Harold Kaufman had been proven guilty beyond a reasonable doubt, justice will have been served. We can ask no more. But if your verdict is in any other context, then justice has not been served.

We are not suggesting in any way that this is not [458] the duty you will perform. In the beginning, you took an oath that you would, and we haven't a doubt in our minds that this will be the duty and the job you will do, because we know you believe also that justice must be available for everyone. If it is not available for Harold Kaufman, where is the next step up the line? Who doesn't get the full measure of rights the next time? It must exist for everyone, and the term must be all-inclusive.

I say to you only perform your task, as I know you will, well. Make sure that this trial does nothing to impair our basic rights, basic concept of the rights of man, our fellow men. Make sure that you accord to Harold Kaufman the presumption of innocence which he is entitled to as a basic matter of right. Make sure that you

require the government to prove its case, if it can, beyond a reasonable doubt, that on December 16, 1963, Harold Kaufman was legally sane. Make sure that if there is a reasonable doubt, and we suggest strongly that there is much more than that, that if there is a reasonable doubt as to his sanity on December 16th, that your verdict be not guilty.

FINAL ARGUMENT IN BEHALF OF THE GOVERNMENT

MR. MARTIN: If it please the Court, gentlemen of the defense, Madam and gentlemen of the jury: I will not attempt to answer the very impassionate argument of counsel on justice, and I, as counsel for the government [459] would be the first to agree that we are here for the purposes of seeing that the defendant receives justice, and that is all that your government asks of you that the defendant receive justice by means of your verdict, and in order to give the defendant justice, your verdict must be based upon the evidence, and your government asks you only to consider the evidence, deliberate carefully, and return a verdict in accordance with your view of the evidence.

That is justice. That is how we obtain justice. That is how we maintain justice, and I repeat, as counsel for the government I heartily agree that we want justice, and personally, I am a supporter of that theory.

But I ask you only to look at the facts of the case, and as we look at the facts of the case what do we have? We have the evidence from Detective Joe Kiernan from New York City. His testimony was to the effect that he had known the defendant, had known of the criminal associations of the defendant, had him under surveillance until the time that he finally arrested him, and there I think we have some evidence of justification for the belief that he was being watched and followed, because Detective Kiernan said that they watched him and his contacts with Jack Keller, and that they kept the building, or apartment building, under surveillance. They even had a couple of the apartments bugged. That is, they had [460] electronic listening equipment in there, so there was some watching.

Furthermore, the defendant, by reason of his activities had reason to believe that the police were looking for him, and Pat Scott, in her testimony, said that there were only about three people looking for him. The police, justifiable reason for looking for him. Jack Keller, to whom he owed some money. And I don't recall whether there was anybody else, but there was nothing imaginary about the people who wanted him and were looking for him. Oh yes, the F.B.I. All of which were very real, all of which he had reason to be afraid that some of them might accost him, at some time he might be taken into custody. That Jack Keller might insist upon getting the money that he thought was owed to him. None of this was imaginary. No hallucinations, no delusions at that time. None at the time Dr. Waitzel examined him. None at the time that he was examined in Springfield, and if you recall, he was there from January 28th, I believe, until about February 14th, going there within about six weeks of the date of the crime here, and if you recall Dr. Waitzel's testimony, I asked him specifically if the testimony of the witnesses that you have heard, Pat Scott and Joe Kiernan, would have a bearing upon your conclusions and your opinions and he said yes, that his opinions were partially dependant upon the truthfulness of that testimony, and let's examine Pat Scott's testimony.

[461] Gentlemen, I won't discuss with you the character of Pat Scott. You heard the testimony, but recall the relationship between the two began some time in August of 1963. She received, according to her own testimony, thousands of dollars from the defendant. They were together, or had an apartment together. They were associated very, rather closely, and that from the very time that she first met him until he was apprehended here in St. Louis, she said that he would go out of town and make hits or scores, and according to—that's her terminology, meaning that he would go out for purposes of robbing or otherwise attempting to get money criminally.

And if you recall the testimony of the detective, it was around about November 1st when the defendant heard about Jack Keller getting someone to enforce payment from him, and I specifically asked Dr. Waitzel what dif-

ferent pressures and stresses did he have that would explain his criminal activity prior to November 1st that did not exist on December 16th other than the threat of Jack Keller.

Now, here we have a professional robber, according to Pat Scott's testimony, one who carries a gun occasionally or frequently, and had one in the apartment, and is charged in New York for having a gun, acting as an informer for the New York City Police Department against the person who claims that he owes some money, and is [462] one of the associates of the group in which he is traveling. And the detective agreed that there was an assumption of risk in acting as an informer. Sure, there is risk. There is risk in being a robber. There is risk in being an informer. There is risk in being a test pilot, a race driver, practically every profession, there is some type of risk, and counsel mentioned that fact that geniuses can be schizophrenic, and I call to your attention that a professional robber can also be schizophrenic, but does that make him a professional robber or did it make the genius, the fact that he had some kind of personality difficulties?

But let's examine just what does he have, or did he have. Dr. Waitzel, as far as he would go, said that when he examined him he was psychoneurotic, had some schizoid personality, and what was the origin of that? That originated because he was born in New York City of a poor family. Being born of a poor family, is that any reason? And it has been said that the Lord must love the poor people, because he created so many of us. Is that any reason for getting a psychosis? Is that an explanation for it? Pat Scott said he wanted to be the best criminal in New York. Yes, that's his chosen profession, and each of us has the ambition of being the best in our chosen profession or occupation; perfectly normal. But when you choose a criminal profession, nothing abnormal about [463] wanting to be the best.

Now, let's look at some of the things that he did around New York, for example.* He was cooperating with the police. Kiernan said that he would always give him logical answers and information, all except when he was at-

tempting to avoid telling something specifically, and the detective's conclusion was that he believed he was sane. But I believe he described him as, I don't know if he used the term "bum" or something of that sort, but it was some derogatory term, or one that we wouldn't ordinarily call one of our friends, but he was sane.

Now, let's look at this question about driving an automobile. Counsel mentioned the fact that he couldn't drive an automobile. Pat Scott said he couldn't drive, but he was apprehended in an automobile that had come from New York City. He was apprehended in an automobile which had been driven from Roosevelt Federal Savings and Loan Association to Alton, Illinois. If you can't drive, I don't think you can bring an automobile from New York City to St. Louis.

There's a lot about Pat Scott's testimony. You can believe it or not believe it, and I submit to you that Pat Scott is the type of person, because of the relationship with the defendant, because of the fact that she had received quantities of money from him, that I don't think [464] that she would hesitate to give any answer or any testimony that she thought would help him. But we have this to remember about Pat Scott, and there's one feature about her which I think we all have to somewhat admire. She's a mother. Though the children are illegitimate, she wants those children. She fought all the way in court for custody of those children. And would a mother who feels like that about her children, allow her three children, or two children, to be in the custody of a person that she thought was insane in the least bit? Think of that when you examine Pat Scott's testimony.

Now, I don't know whether I should take too much time, but I'd like to call one thing to your attention. The Court mentioned to you that Dr. Paul Hartman, on motion of the defendant, had examined the defendant, and I would like to make this observation. I am curious as to why, after that examination was made, he was not called by them as a witness. Just think of that in connection with Dr. Hartman, but let's take the diagnosis of the doctors at Springfield that actually examined him.

Dr. Waitzel hadn't examined him since 1960. We are

interested in something that is proximate to the date of December 16, 1963, and the most proximate examination as of that date, I am talking about a thorough examination, would have been at Springfield, and the diagnosis at [465] Springfield was schizophrenic reaction, paranoid type in partial, rather stable remission. And you remember how Dr. Glotfelty explained that to you? He said that stable is, according to my idea or language, was more or less solid, and if you say rather stable, that is the higher classification of stable. I guess the table here is stable, but bolted down to the floor and it might be more stable, but he said that when a person reaches that point, the only point above it would be normal, and that he would be discharged from any hospital in the country.

Of course, Dr. Weiland said that he doesn't use the term cured, and I don't think they use it in tuberculosis or other diagnoses where you use the terms arrested and remission, but if you are dealing with this type of an individual, and they say that he is in rather stable remission, it means that he is just at the point of being normal. And I submit to you that you can be less than normal and yet be criminally responsible for your acts. Do you know right from wrong? Are you able to recognize that you are committing a wrongful act? Are you able to refrain from commission of that wrongful act? Those are some of the things to be considered in determining whether or not a person is legally sane and legally responsible for his criminal acts. We noticed that the defendant had enough control to stop any arguments with [466] Pat Scott whenever she more or less directed him to.

THE COURT: You have about two minutes.

MR. MARTIN: Thank you, Your Honor.

We noticed in the evidence other factors wherein he exercised control of himself. How many robberies has he committed? How many robberies is he going to commit in the future and claim that "I did it because I have an uncontrollable impulse to rob somebody to get money for Pat Scott"? Are we going to allow him to continue, and to accept such an excuse unless there is proof or evidence showing that he is mentally deficient to the extent you can say he is not criminally responsible?

MR. BARSANTI: If the Court please, I object to that misconstruction of the law by the government. It is not the defendant's duty to prove anything.

THE COURT: Well, the Court will instruct the jury as to what the law is. All right. This is argument of counsel, and I have already instructed them several times.

* **MR. MARTIN:** Now, ladies and gentlemen, you heard the testimony. You heard the evidence. You know what the issues are, and I am confident if you consider the evidence and the facts in your deliberations, that you will return a verdict of guilty as charged. Thank you.

COURT'S CHARGE TO THE JURY

THE COURT: Members of the jury:

[467] It now becomes my duty to give you instructions as to the law which you will use and be governed by and apply to the facts in this case in reaching your verdict on the questions that are presented to you for your decision.

You have listened to the evidence and the arguments of counsel and it now becomes my duty to instruct you as to the law. I can only give you these instructions orally as I am now doing. There is no provision in the law that permits me to give you your instructions in any other manner. It is, therefore, necessary that you pay close attention so that you may carry these rules of law to your jury room and there use and apply them to the facts of this case.

You should bear in mind that while it may appear from time to time that I am giving you special instructions, that is not correct. I am giving you instructions which should be received by you to apply as a whole. Don't attempt to separate them and disregard part of them and use and apply the remainder.

It is my duty to pass on all questions of law and at the close of the argument to charge you with respect to the law; in other words, to tell you what the law is to guide you in your deliberations. It is your function and duty to pass on the facts, and when you have determined what those facts are, to apply the law as the Court shall give

it to you to those facts. In approaching and performing [468] your duties, you should have but one purpose; you should have a zeal and determination to do justice, exact and impartial, between the Government on the one hand and the defendant on the other. You have nothing to do with the matter of fixing punishment, that becomes the sole duty of the Court in the event the defendant is found guilty. You will, therefore, direct your attention to the testimony in the case and determine from it what the true facts of the case are and apply the law as I shall give it to you, to those facts, and thus arrive at a verdict under the law and the evidence.

You are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony, as well as all the evidence and facts and circumstances detailed before you and which have been presented in this trial. In weighing and reconciling the testimony, you should look to demeanor and manner of the witness testifying, his willingness or unwillingness to answer; to the lack of interest, or interest, of any witness in the case; to the relationship of the parties; to the means of knowledge, or lack of knowledge of the facts about which such witness testifies; to the opportunity of the witness to know the facts about which he purports to testify; to the reasonableness or unreasonableness of the witness's testimony; to its probability or improbability, and whether the witness has made contradictory statements or not, [469] about material matters involved in this case, and thus having carefully considered all the matters, you must fix the weight and value of the testimony of each and every witness and of the evidence as a whole.

If you should conclude that a witness has willfully testified falsely to some material matter in the case, you should consider that in determining the credibility of the rest of such witness's testimony, and you are at liberty to reject all of such witness's testimony, as well as the part which you feel to have been willfully false.

In stating this to you I do not mean to imply that any witness has willfully testified falsely. I merely give you this as a guide to be used by you in determining the weight and value to be given the testimony before you.

This is a criminal case, Members of the Jury, as you know; and a criminal case, whatever its importance, whatever its seriousness, is hedged about with certain age-old rules. The burden to make out the guilt of the defendant on trial in this case is upon the Government; that burden the Government assumes in the beginning and carries throughout to the end, until it has met it by showing to you the guilt of the defendant beyond a reasonable doubt.

It has been and will be the Court's purpose in this case to express no opinion upon the facts, for that is your [470] province, and the Court does not propose, even if it had the power to do so, to influence your judgment on the facts to even the slightest degree. Therefore, if during this trial you have imagined or gained the impression that the Court had any opinion in regard to this case, so far as the facts are concerned, dismiss that impression from your minds, because the Court meant to express, neither by manner nor by voice, any opinion on the facts. If it should seem to you at any time during this charge that the Court has an opinion respecting what may or may not be a fact, you should still remember that the Court's conclusion is in no sense to weigh upon you or control you in your finding and determination of what the facts are in this case.

The burden of proof, as you have been told, is upon the Government. All of the presumptions of the law, aside from the evidence, are in favor of innocence and the defendant is presumed to be innocent until proven guilty. This presumption of innocence attends and protects the defendant throughout the trial until it has been met and overcome by evidence coming forward in the case, and it makes no difference from which side it comes, which shows and establishes the defendant's guilt beyond a reasonable doubt.

The Court further charges you that a reasonable doubt [471] is a doubt based on reason, and which is reasonable in view of all the evidence.

A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an abso-

lute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

Prosecution in this case is based upon a statute which [472] is Federal law. The pertinent part of the statute reads substantially as follows: (18 U.S.C. Section 2113 (a).)

"(a) whoever by force and violence, or by intimidation takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association;"

shall be punished as the statute provides. And the statute defines a "savings and loan association" as:

"the term 'savings and loan association' means any Federal savings and loan association . . ."

The indictment in this case is based on this statute and reads as follows:

"The Grand Jury charges:

That on or about the 16th day of December, 1963, in St. Louis County, in the State of Missouri, within the Eastern Division of the Eastern District of Missouri,

HAROLD KAUFMAN,

the defendant, did, by force and violence, and by intimidation, take from the presence of another, to wit, Lloyd A. Woollen, Manager of the Roosevelt Federal Savings and Loan Association, certain money, to wit, the sum of \$328.50 more or less, in lawful money of the United States, belonging to, and in the care, custody, control, management and possession of said Roosevelt Federal Savings and Loan Association; a Federal savings and loan association authorized and acting under the laws of the [473] United States, the accounts of which are insured by the Federal Savings and Loan Insurance Corporation; that in committing the above offense, he, the said defendant, did put in jeopardy the life of the said Lloyd A. Woollen by the use of a dangerous weapon and device.

In violation of Section 2113(a) and (d), Title 18, United States Code."

The indictment is not to be considered by the jury as any evidence of the defendant's guilt. It ought not, in your minds, create even a suspicion of guilt upon his part. It is merely the manner by which the case is brought before you, for your consideration, and the fact that an indictment has been returned ought not to be considered as any evidence of the guilt of the defendant. The defendant is presumed to be innocent, and that presumption continues with him until such a time as you become satisfied from the evidence of his guilt, and you must be so satisfied beyond a reasonable doubt.

Now, in a criminal case, the matter of intent is, of course, an essential element which must exist, in order for the accused to be criminally liable. Therefore, in order to find this defendant guilty, you must not only believe that he did the acts complained of, and of which he stands charged, but you must also believe that the acts were [474] intentional and knowingly done by the defendant, but you cannot find such acts were intentionally and knowingly done by the defendant, if you find he was insane as explained elsewhere in this charge.

It is the position of the Government that the defendant, Harold Kaufman, did on the 16th day of December,

1963, while legally sane, by the use of a dangerous weapon, put the life of Lloyd A. Woollen, Manager of the Roosevelt Federal Savings and Loan Association, in jeopardy and intimidate him and took from his presence the sum of \$328.50, belonging to the Roosevelt Federal Savings and Loan Association.

The phrase "legally sane" is defined in other instructions which the Court will give to you.

For your guidance and assistance I shall now briefly state the position of the defendant.

From the very beginning, the defendant has freely admitted that physically he performed the acts charged in the indictment. He has never disputed these facts, and does not now make them an issue in this case. Defendant's sole contention is that at the time of the offense, December 16, 1963, his mental condition was such that he was not criminally accountable for his conduct at that time.

Under his plea of "not guilty", the defendant has raised [475] the defense of insanity at the time of the alleged offense. The law does not hold a person criminally accountable for his conduct while insane.

The term "insanity" as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

Temporary insanity, as well as insanity of longer duration, is recognized by the law, and to cast light on the mental condition of the accused at the time of the alleged offense, you may consider evidence of his mental state both before and after that time.

The defense of insanity having been raised in this case, and evidence bearing on this defense having been adduced, the burden is upon the Government to establish beyond a

reasonable doubt, as that term is more fully defined elsewhere in these instructions that the defendant was sane at the time of the alleged offense. If, upon considering [476] all the evidence, you believe beyond a reasonable doubt that defendant was sane at the time of the alleged offense, you should find him accountable for his actions at that time, but if you have a reasonable doubt as to his sanity at that time, you must acquit him even though you may find that he was sane at earlier and/or later times.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

The defendant has the constitutional right not to take the witness stand and testify, and you are not to draw any presumption of guilt or any inference whatsoever from defendant's decision to exercise his constitutional right not to testify at this trial.

[477] Non-expert or lay witnesses are ordinarily not entitled to express their opinions for the jury to consider, but where such a witness has had the opportunity of associating with and observing the defendant and his acts and conduct over a period of time, then the witness is entitled to express his opinion as to the defendant's mental condition and his sanity as of the time he is alleged to have committed a crime, and you may give such testimony on the part of the lay witness such weight as you feel it deserves.

The defendant is only on trial for the robbery of Roosevelt Federal Savings and Loan Association on December 16, 1963; he is not on trial for any other act or conduct, and in this respect evidence of his connection with or involvement in any other criminal activity is not to be

considered by you in determining his guilt at this trial.

I have caused to be prepared for you, member of the jury, a blank form of verdict. You will use the form that I shall submit to you whether you find the defendant guilty or not guilty.

When you have unanimously agreed upon a verdict, one of your number will sign it as foreman and return it into Court.

You have nothing to do with the punishment; that is [478] for the Court. Your sole duty is performed when you have found upon the question of guilt or innocence of the defendant.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 890 Misc., October Term, 1967

HAROLD KAUFMAN, PETITIONER

v.

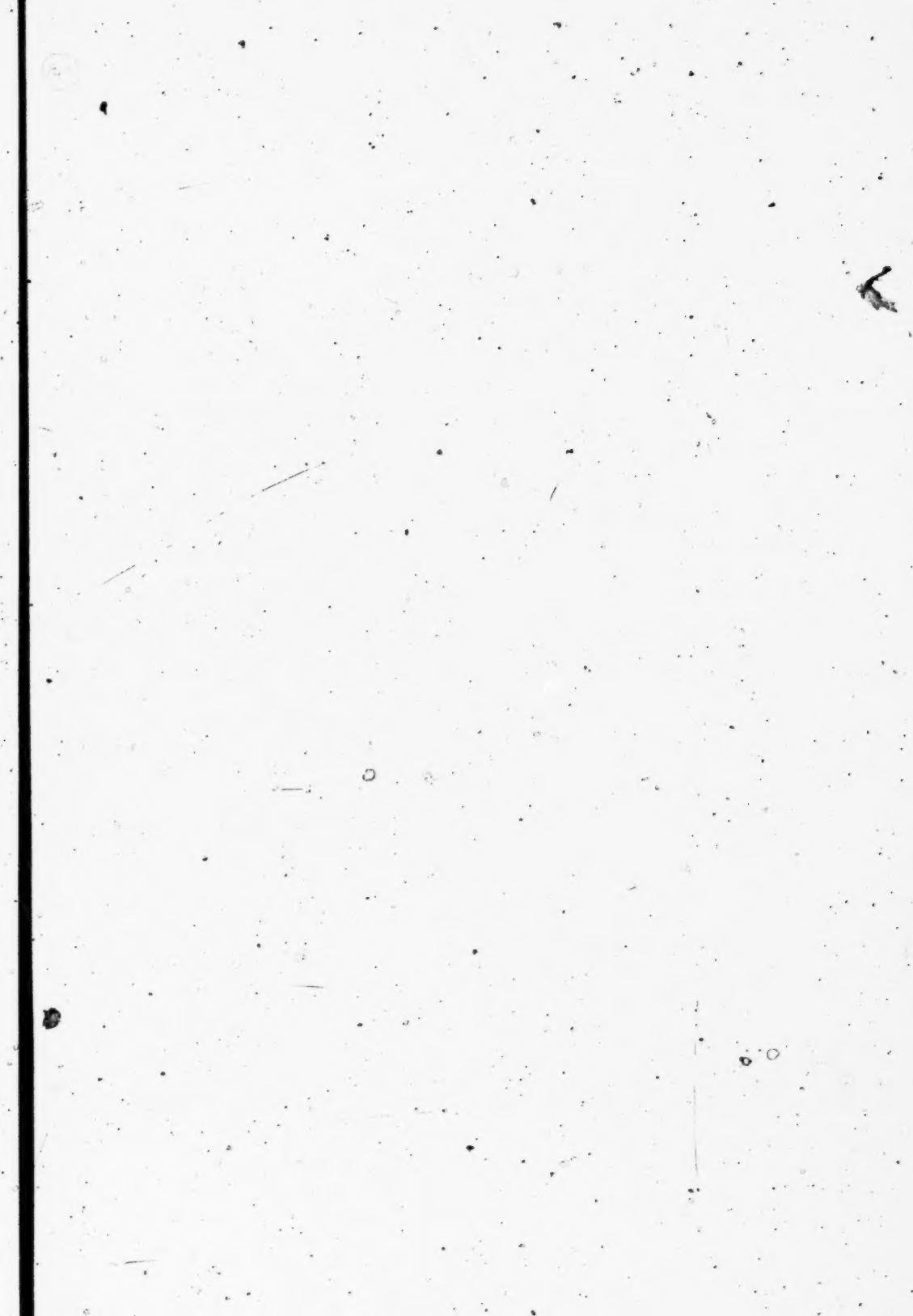
UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND GRANTING PETITION FOR
WRIT OF CERTIORARI—April 1, 1968

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1281 and placed on the summary calendar.

Mr. Justice Marshall took no part in the consideration or decision of this motion and petition.



LIBRARY

SUPREME COURT, U. S.

Office Supreme Court
FILED

AUG 13 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

BRUCE R. JACOB

WILLIAM F. C. SKINNER, JR.

Legal Assistance for Inmates Program

Emory University School of Law

Atlanta, Georgia 30322

Attorneys for Petitioner

INDEX

SUBJECT INDEX

	Page
Table of Cases	ii
Opinions of Courts Below	1
Basis for Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	3
Introductory Statement	3
Statement of the Case and Facts	4
Summary of Argument	17

ARGUMENT

Point 1. A Sentence Based Upon Evidence Obtained Through an Unreasonable Search and Seizure in Violation of the Fourth Amendment Is Subject to Collateral Attack Under 28 U.S.C. § 2255	20
---	----

Point 2. Failure of Court of Appeals, in Petitioner's Direct Appeal From His Conviction, to Consider Issue of Improper Search and Seizure Which, on Suggestion of Court of Appeals' Clerk, Was Raised by Court-Appointed Appellate Counsel in Letter to Court of Appeals Subsequent to Oral Argument, Entitled Petitioner to a Consideration of the Search and Seizure Issue in a Proceeding Under 28 U.S.C. § 2255	28
---	----

Point 3. Evidence Obtained Through a Warrantless Search of Petitioner's Automobile Sev-	
---	--

eral Hours After His Arrest for a Traffic Violation, in a Garage Located Some Distance From the Place of Arrest and Some Distance From the Place at Which Petitioner Was Being Detained, Was Not Properly Admitted in Evidence Against Petitioner at His Trial for Robbery of a Savings and Loan Association. Further, Evidence Obtained Through a Search of Petitioner's Person at the Police Station After His Arrest on the Traffic Charge Was Not Properly Admitted Against Him	35
CONCLUSION	49
Certificate of Service	50
APPENDICES	
APPENDIX A. Constitutional and Statutory Provisions Involved	51
APPENDIX B. Affidavit of Harold Kaufman	54
APPENDIX C. Affidavit of Walter E. Diggs, Jr.	56
APPENDIX D. Correspondence From Files of Office of the Clerk, United States Court of Appeals for the Eighth Circuit	58

TABLE OF CASES

SUPREME COURT CASES:

<i>Anders v. California</i> , 386 U.S. 738 (1967)	30, 31, 32
<i>Burdeau v. McDowell</i> , 256 U.S. 465 (1961)	40
<i>Carafas v. LaVallee</i> , 36 L.W. 4409 (1968)	26
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	47
<i>Cooper v. California</i> , 386 U.S. 58 (1967)	38, 39

INDEX

iii

Page

<i>Douglas v. California</i> , 372 U.S. 353 (1963)	28
<i>Dykes v. Taylor Implement Manufacturing Co.</i> , 36 L.W. 4436 (1968)	37
<i>Ellis v. United States</i> , 356 U.S. 674 (1958)	28
<i>Entsminger v. Iowa</i> , 386 U.S. 748 (1967)	31, 32
<i>Fahy v. Connecticut</i> , 375 U.S. 85 (1963)	47
<i>Fallen v. United States</i> , 378 U.S. 139 (1964)	29
<i>Fay v. Noia</i> , 372 U.S. 391 (1963)	25
<i>Harris v. United States</i> , 36 L.W. 4195 (1968)	39, 40
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965)	26
<i>James v. Louisiana</i> , 382 U.S. 36 (1965)	43
<i>Johnson v. United States</i> , 352 U.S. 562 (1957) ..	28
<i>Jones v. United States</i> , 362 U.S. 257 (1960)	43, 44
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961)	21, 25
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	28, 41
<i>Preston v. United States</i> , 376 U.S. 364 (1964) ..15,	36, 39
<i>Sanders v. United States</i> , 373 U.S. 1 (1963)	24, 27
<i>Simmons v. United States</i> , 36 L.W. 4227 (1968) ..	44
<i>Stoner v. California</i> , 376 U.S. 483 (1964)	37
<i>United States v. Hayman</i> , 342 U.S. 205 (1952) ..	24, 27
<i>Waley v. Johnston</i> , 316 U.S. 101 (1942)	25

FEDERAL CASES:

<i>Armstead v. United States</i> , 318 F.2d 725 (5th Cir. 1963)	21
<i>Boruff v. United States</i> , 310 F.2d 918 (5th Cir. 1962)	28
<i>California v. Hurst</i> , 325 F.2d 891 (9th Cir., 1963)	27
<i>Coleman v. Maxwell</i> , 351 F.2d 285 (10th Cir., 1965)	27
<i>Cox v. United States</i> , 351 F.2d 280 (8th Cir. 1965)	20

	Page
<i>DeWelles v. United States</i> , 372 F.2d 67 (7th Cir. 1967)	21
<i>Dillion v. Peters</i> , 341 F.2d 337 (10th Cir., 1965)	27
<i>Edwards v. United States</i> , 256 F.2d 707 (D.C. Cir. 1958), cert. den., 358 U.S. 847 (1958)	21
<i>Eisner v. United States</i> , 351 F.2d 55 (6th Cir. 1965)	21
<i>Gaitan v. United States</i> , 317 F.2d 494 (10th Cir. 1963)	23
<i>Ganci v. United States</i> , 287 F. 60 (2d Cir. 1923), cert. den. 262 U.S. 755 (1923)	46
<i>Gendron v. United States</i> , 340 F.2d 601 (8th Cir. 1965)	20
<i>Gilbert v. United States</i> , 307 F.2d 322 (9th Cir. 1962)	46
<i>Hoffman v. United States</i> , 327 F.2d 489 (9th Cir. 1964)	21
<i>Jones v. United States</i> , 258 F.2d 420 (D.C. Cir. 1958), cert. den., 357 U.S. 932 (1958)	21
<i>Kapsalis v. United States</i> , 345 F.2d 392 (7th Cir. 1965), cert. den., 382 U.S. 946 (1965)	21
<i>Nash v. United States</i> , 342 F.2d 366 (5th Cir. 1965)	21
<i>Peters v. United States</i> , 312 F.2d 481 (8th Cir. 1963)	20
<i>Plummer v. United States</i> , 260 F.2d 729 (D.C. Cir. 1958)	21
<i>Saulsbury v. Green</i> , 347 F.2d 828 (6th Cir. 1965)	27
<i>Sinks v. United States</i> , 318 F.2d 436 (7th Cir. 1963), cert. den., 375 U.S. 946 (1963)	21
<i>Springer v. United States</i> , 340 F.2d 950 (8th Cir. 1965)	20

INDEX

V

Page

<i>Thomas v. United States</i> , 308 F.2d 369 (7th Cir. 1962)	21
<i>Thompson v. United States</i> , 315 F.2d 689 (6th Cir. 1963), cert. den., 375 U.S. 843 (1963)	21
<i>Thornton v. United States</i> , 368 F.2d 822 (D.C. Cir. 1966)	22
<i>United States v. Jenkins</i> , 281 F.2d 193 (3rd Cir. 1960)	21
<i>United States v. Re</i> , 372 F.2d 641 (2d Cir. 1967), cert. den., 388 U.S. 912 (1967)	21
<i>United States v. Sutton</i> , 321 F.2d 221 (4th Cir. 1963)	22, 23
<i>United States v. Winstead</i> , 226 F. Supp. 1010 (N.D. Cal. 1964)	23
<i>United States ex rel. Angelet v. Fay</i> , 333 F.2d 12 (2d Cir. 1963)	27
<i>United States ex rel. DeNegris v. Menser</i> , 247 F. Supp. 826 (D.C. D. Conn. 1965), aff'd 360 F.2d 199 (2d Cir. 1966)	27
<i>United States ex rel. West v. LaVallee</i> , 335 F.2d 230 (2d Cir. 1964)	27
<i>Warren v. United States</i> , 311 F.2d 673 (8th Cir. 1963)	20
<i>Weed v. United States</i> , 340 F.2d 827 (10th Cir. 1965)	46
<i>White v. United States</i> , 235 F.2d 221 (D.C. Cir. 1956)	21
<i>Wilkins v. United States</i> , 258 F.2d 416 (D.C. Cir. 1958), cert. den., 357 U.S. 942 (1958)	21
<i>William v. United States</i> , 307 F.2d 366 (9th Cir. 1962)	21
<i>Williams v. United States</i> , 382 F.2d 50 (5th Cir., 1967)	38
<i>Wilson v. Porter</i> , 361 F.2d 412 (9th Cir., 1966)	27
<i>Wrightson v. United States</i> , 95 U.S.App. D.C. 390, 222 F.2d 556 (1955)	46

STATE CASES:

<i>People v. Ibarra</i> , 34 Cal. Rptr. 863, 386 P.2d 487 (1963)	41
<i>People v. Martin</i> , 45 Cal.2d 755, 290 P.2d 855 (1955)	45

CONSTITUTIONAL PROVISIONS:

United States Constitution

Article I, Section 9, Clause 2	2, 23
Fourth Amendment	2, 3, 20, 22, 38
Fifth Amendment	2
Sixth Amendment	2, 22, 41
Fourteenth Amendment	30, 38

RULE:

Federal Rules of Criminal Procedure

Rule 41(e)	46
------------------	----

STATUTES:

18 U.S.C. § 2113(a) and (d)	7
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2241 et seq.	2, 23
28 U.S.C. § 2255	1, 2, 3, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 28, 34

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

Opinions of Courts Below

The opinion of the United States District Court for the Eastern District of Missouri, denying petitioner's motion and supplemental motion to vacate sentence under 28 U.S.C. § 2255, is reported at 268 F. Supp. 484 (1967). The order of that court entered on March 27, 1967, denying petitioner's application to appeal *in forma pauperis* has not been reported.

The order of the United States Court of Appeals for the Eighth Circuit, entered on May 11, 1967, denying petition-

er's motion for leave to appeal *in forma pauperis*, and the order of that same court entered on August 7, 1967, denying petitioner's motion for rehearing, have not been reported.

Basis for Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order or judgment sought to be reviewed was rendered by the United States Court of Appeals for the Eighth Circuit on May 11, 1967, denying a motion by petitioner to proceed on appeal *in forma pauperis* from a decision by the United States District Court for the Eastern District of Missouri. Petitioner's motion for rehearing in the Eighth Circuit was denied by order entered on August 7, 1967. The petition for writ of certiorari in this case was filed on Monday, November 6, 1967, within the required time period for filing such a petition.

Constitutional and Statutory Provisions Involved

Article I, Section 9, Clause 2 of the Constitution

Fourth Amendment to the Constitution

Fifth Amendment to the Constitution

Sixth Amendment to the Constitution

28 U.S.C. § 2241

28 U.S.C. § 2255

(These provisions are set out in Appendix A of this brief.)

Questions Presented

1. Whether a sentence based upon evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is subject to collateral attack under 28 U.S.C. § 2255.

2. Whether failure of Court of Appeals, in petitioner's direct appeal from his conviction, to consider issue of improper search and seizure which, on suggestion of Court of Appeals' clerk, was raised by court-appointed appellate counsel in a letter to Court of Appeals subsequent to oral argument, entitles petitioner to a consideration of the search and seizure issue in a proceeding under 28 U.S.C. § 2255.

3. Whether evidence obtained through a warrantless search of petitioner's automobile several hours after his arrest for a traffic violation, in a garage located some distance from the place of arrest and some distance from the place at which petitioner was being detained, was properly admitted in evidence against petitioner at his trial for robbery of a savings and loan association. Further, whether evidence obtained through a search of petitioner's person at the police station after his arrest on the traffic charge was properly admitted against him.

Introductory Statement

Page numbers in the printed Appendix, when referred to, shall be prefaced by the letter "A." As used hereinafter, the symbol "R. Cr." shall refer to portions of the record in Case No. 64 Cr. 12(3) which have not been reproduced in the printed Appendix, and the symbol "R. C." shall refer to

portions of the record in Case No. 66 C. 218(3). The letter "T" shall refer to portions of the trial transcript which have not been reproduced in the printed Appendix.

Statement of the Case and Facts

On December 16, 1963, a branch office of the Roosevelt Federal Savings and Loan Association located in the River Roads Shopping Center, Jennings, Missouri, was robbed by petitioner Harold Kaufman while armed with a pistol. He obtained the sum of \$328.50 in currency and approximately \$11,520.00 worth of travelers' checks. Petitioner had entered at approximately 4:00 P.M., and the robbery began at about 4:10 or 4:13 P.M. The robbery was completed at about 4:19 P.M. (T. 49, 50).

At 4:40 P.M. that same day an officer of the police department of the city of Alton, Illinois, named Charles Stahl, received a message from his dispatcher to proceed to the entrance of a bridge which crosses the Mississippi River at Alton and watch for a 1964 red Rambler automobile bearing New York license plates 8Z6367 possibly coming across the river from Missouri (A. 53, 54). He was told by the dispatcher that the Rambler had been involved in a hit-and-run accident (A. 53). Shortly after receiving this call officer Stahl saw the described automobile coming across the bridge. Stahl followed the Rambler. He signalled for the car to stop. The driver of the Rambler was driving at a slow rate of speed, at approximately 20 to 30 miles per hour (A. 60, 61). He attempted a turn, going up a hill, and when he did the car skidded on the ice, ran up over the sidewalk, and hit a tree. Then the car rolled backward across the street and came to a stop (A. 61, 62).

Officer Stahl and petitioner Harold Kaufman, the driver of the car, got out of their respective cars and discussed the accident that had just occurred. Kaufman was arrested at that time for a traffic violation (A. 54, 55) and a wrecker was called to tow away the automobile. Kaufman was taken to the Alton city police station. The arrest occurred at 4:40 and the officer and Kaufman arrived at the police station at about 4:45 P.M. (A. 55, 56).

At about 4:43 or 4:44 P.M. that day Cliff Martin, who operated a towing service in Alton, received a call from the Alton police to tow in the Rambler (A. 66). He arrived at the scene within two or three minutes (A. 66), picked up the car and towed it to his place of business (A. 64). After Mr. Martin had parked the car in the garage, and while he was checking the car for personal belongings, he saw a pistol on the back seat of the car with the barrel pointing against the left-hand panel. Mr. Martin phoned the police department, told them he had found a pistol in the car and asked them to send a man out to take care of it (A. 65). Officer Stahl was sent to the garage. Martin stuck a pencil in the barrel end of the pistol, took it out of the car, brought it into his office and placed it on a towel on his desk. According to Martin, when Stahl arrived he (Stahl) told Martin to finish wrapping it and to lock it up until the F. B. I. arrived and Martin did as he was told (A. 65, 66). According to officer Stahl's version, Stahl saw the pistol in the car and saw Martin remove it from the car (A. 58, 59). Subsequently an F. B. I. agent came to the garage and picked up the pistol (A. 65, 66).

Back at the Alton police station officers Stahl and John Light of the department, in the presence of Captain Peterson, made a search of Kaufman's person and found ap-

proximately \$352.00 in currency and a contract for the rental of the Rambler showing that the car had been leased to one Arthur Cooper (A. 67-72; 80-81). The currency was later released to the F. B. I. (A. 71). The search of Kaufman's person was apparently considered a search by the police and not a mere inventory of his personal belongings (A. 67-72; 86-87). It is not clear, from the trial transcript, what time it was when this search was conducted. Further, it is not clear whether the search of Kaufman's person was conducted before or after the discovery of the pistol by Cliff Martin, or whether the police knew, at the time of the search of Kaufman's person, that the pistol had in fact been found in the Rambler by Martin.

An F. B. I. agent named Albert Rushing was ordered by his St. Louis office to go to the Alton police station. He arrived there at about 6:30 P.M. After his arrival Captain Peterson turned over to Rushing the auto rental contract and the \$352.00 which the police had obtained in the search of Kaufman's person (A. 80-83; 86-87). Between 6:40 and 7:00 P.M. Rushing told Kaufman that federal charges were going to be filed (A. 87, 104). At 8:00 P.M. Kaufman was taken by F. B. I. agents to St. Louis and deposited in a jail in St. Louis at about 9:55 that evening (A. 103, 93). He was given a preliminary hearing the following morning, December 17 (A. 92).

F. B. I. agents named John Newcomer and James Talley, who had been investigating the robbery of the Roosevelt Federal Savings and Loan Association, were ordered, at 7:30 P.M. (A. 78, 79) by their St. Louis office to go directly from the scene of the robbery to the Cliff Martin towing service garage in Alton where the Rambler was located. They arrived there at about 9:00 P.M. (A. 78, 79). They

searched the car without a search warrant (A. 72-79). The search lasted approximately two hours (A. 78). At the time of the search these agents did not know whether Kaufman was under arrest by the United States (A. 78). On the "floor board" they found two packets of American Express travelers' checks, having a face value of \$11,520.00 (A. 73). Also, "in the car" they found a summons for traffic violations issued by the Criminal Court of the City of New York (A. 75); a receipt dated December 15, 1963, showing that gasoline had been purchased on that date in Harrisburg, Pennsylvania (A. 75); a Western Union telegraph receipt dated December 15, 1963, in Harrisburg, Pennsylvania, showing payment of \$50.00 from Paul King (an alias for Harold Kaufman) to Mrs. Pat Scott in New York City (A. 90, 75); and a receipt for road service dated December 15, 1963, in Willow Grove, Pennsylvania (A. 75, 76). Further, they found a receipt showing that the pistol found in the car had been purchased on December 16, 1963, that same day, at Wittel's Gun Shop in Alton.¹

Attorney John R. Barsanti, Jr. of St. Louis, Missouri, was appointed (R. Cr. 55) by the United States District Court for the Eastern District of Missouri, to defend Harold Kaufman. Kaufman was indicted for the crime of armed robbery of the Roosevelt Federal Savings and Loan Association in violation of 18 U.S.C. § 2113(a) and (d).

¹ This receipt was never introduced in evidence at Kaufman's trial, and therefore there is no reference to it in the record in this case. The fact that such a receipt was found in the car was first made known to undersigned counsel through a letter from petitioner, at the United States Penitentiary, Terre Haute, Indiana, dated July 29, 1968. This has been verified through a telephone conversation between petitioner, in Terre Haute, and undersigned counsel, in Atlanta, on August 1, 1968.

When Mr. Diggs received this letter from Harold Kaufman, according to his affidavit in Appendix C of this brief:

"... I was still of the opinion that the illegal search and seizure issue was without merit. However, I determined to take every precaution to follow his desires, and accordingly, went to the court and discussed with the clerk the matter of raising the issue of illegal search and seizure at that time. Mr. Tucker, the Clerk of the Court, informed me that in his opinion there was no formal way to bring the issue of illegal search and seizure before the court at that time. However, he suggested that I send Mr. Kaufman's letter to him, requesting that it be brought to the attention of the judge who had heard my argument. I followed his advice, sending Mr. Kaufman's letter to Mr. Tucker on June 17, 1965."

Pursuant to the advice given him by Mr. Tucker, Mr. Diggs forwarded Kaufman's letter of April 26, 1964, together with some other correspondence which he had received from Kaufman, to Mr. Tucker. The cover letter is dated June 17, 1965, and in it Mr. Diggs said the following:

"I enclose herewith letters which I have received from Mr. Kaufman since I argued the above captioned cause on March 9, 1965. You will notice that in his letter of April 26, 1965 that he has cited the case of Preston vs. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted."

(This letter is set out in its entirety in Appendix D of this brief, *infra*.)

The Court of Appeals affirmed Kaufman's conviction by opinion dated September 8, 1965, rehearing denied October 18, 1965, without making any reference to the search and seizure issue, 350 F.2d 408.

Attorneys Robert O. Hetlage and Walter E. Diggs, Jr. then filed a petition for writ of certiorari in this Court (October Term, 1965), raising the following issue, among others:

"Whether evidence obtained by an F.B.I. search of Petitioner's automobile without a warrant approximately five hours following his arrest for a traffic violation was properly admissible in a subsequent trial for armed robbery of a federally insured savings and loan association...."

(See page 2 of the petition for writ of certiorari in the file of this Court in No. 1025, Misc., October Term, 1965.)

In their 1965-66 petition for certiorari the attorneys for petitioner Kaufman stated that, after the argument of the appeal before the Eighth Circuit, following a procedure suggested by the clerk of that court, Mr. Diggs had written a letter to the court raising the search and seizure issue and enclosing a letter from Kaufman citing the *Preston* case, but that the Eighth Circuit had been silent on the issue in its opinion (see pages 4. and 5. of the 1965-66 petition for writ of certiorari). This Court denied the petition, 383 U.S. 951 (1966).

No motion to suppress any of the above-described evidence was made in Kaufman's behalf prior to the trial.

Kaufman was tried by a jury on August 24 through 27, 1964. In his opening statement, Mr. Barsanti conceded the fact that defendant was the man who had robbed the Roosevelt Federal Savings and Loan Association on December 16, 1963, but he stated that defendant was legally insane at the time (A. 36-38).

During the trial the American Express travelers' checks which had been obtained by the F. B. I. during the search of the Rambler were admitted in evidence, without objection by the defense (Govt. Exs. 5-A and 5-B; A. 48).

The pistol which had been found and removed from the back seat of the Rambler by Cliff Martin was admitted in evidence, without objection (Govt. Ex. 6; T. 59, 60). Also, the prosecution presented testimony of John Davis, the manager of Wittel's Gun Shop, in Alton to the effect that Kaufman, using the name of Arthur Cooper, had purchased the pistol from Davis on December 16, 1963. He testified that he and Kaufman had talked for 20 or 25 minutes, and that during this conversation Kaufman had talked normally, coherently, and had not appeared to be nervous or agitated (A. 51, 52).² During the purchase Kaufman had filled out

² Petitioner Kaufman stated to undersigned counsel, in their telephone conversation of August 1, 1968, mentioned in footnote 1, that John Davis and Wittel's Gun Shop were connected to the crime, traced and located by the police or F. B. I., either through the serial number on the pistol or through the receipt for the gun which had been found during the search of the Rambler by the F. B. I. (See footnote 1.) Therefore, if either the pistol or the receipt was obtained through an unreasonable search and seizure, the entire testimony of John Davis is tainted as the product or "fruit" of an illegal search and seizure and should not have been used against petitioner in his trial. This testimony was extremely

a gun registration card, and this card was introduced in evidence at the trial, without objection (Govt. Ex. 7; T. 59, 60).

The auto rental contract in the name of Arthur Cooper and a portion of the \$352.00 which had been taken from Kaufman during the search of his person conducted at the Alton police station subsequent to his arrest (the portion representing the proceeds of the robbery) were introduced in evidence (Govt. Exs. 8 and 13; A. 83). Mr. Barsanti objected to the introduction of these exhibits and moved that they be excluded on the ground that they were taken from the person of Harold Kaufman illegally as evidence for use in the robbery case, in the course of a traffic investigation (A. 67, 68, 83). Mr. Barsanti's objections were overruled by the court.

The summons from the Criminal Court of the City of New York which had been found by F. B. I. agents during the search of the Rambler at Cliff Martin's garage was admitted in evidence (Govt. Ex. 9; A. 75, 76); the gasoline receipt, dated December 15, 1963, in Harrisburg, Pennsylvania, was admitted against defendant (Govt. Ex. 10; A. 75, 76); the Western Union money order telegraph receipt, also dated December 15, 1963, in Harrisburg, showing payment of \$50.00 to Mrs. Pat King was admitted (Govt. Ex. 11; A. 75, 76) as Exhibit 11 (Tr. 105, 106) and the gasoline receipt of the same date from Willow Grove, Pennsylvania, was admitted (Govt. Ex. 12; A. 75, 76). Mr. Bar-

prejudicial to petitioner. In a letter dated July 29, 1968, to undersigned counsel, petitioner said the following:

"... Please in the brief hit hard and often on the prejudice to the insanity defense this evidence caused, remember the salesman of the gun testified and hurt me bad, his name was gotten from the gun and the receipt in the car."

santi objected to the admission of these four exhibits on the ground that they had been obtained by the F. B. I. through an illegal search at a time when Kaufman was under arrest on nothing more than a traffic charge (A. 75-78).

Kaufman's defense was that he had been legally insane at the time of the robbery. He had a number of witnesses, including psychiatrists, who gave evidence tending to establish that he had been insane at the time of the crime. Kaufman did not testify in his own behalf.

In rebuttal, the government introduced testimony of F. B. I. agents George Peet and Franklin Walls, who had interrogated Kaufman in Alton and St. Louis following his arrest, to the effect that Kaufman had been "coherent," "intelligent," "logical" and "sane" at the time (A. 92 through 121). The prosecution used Government Exhibits 8 through 12 to show where Kaufman had been during the day or two preceding the day of the robbery (A. 77, 78), and, further, that during the two days immediately preceding the robbery he had been rational, competent and sane enough to drive a car almost half the way across the United States, from New York to St. Louis, and to purchase gasoline, and wire \$50.00 by Western Union to Mrs. Pat Scott, his girl friend in New York. The following excerpt from the closing argument of the prosecutor, Mr. Martin, will illustrate how Exhibits 9 through 12 (and the auto rental contract, Exhibit 8) were used as rebuttal evidence against Kaufman on the insanity issue:

"... As a matter of fact, you recall the opening statement of the defense counsel, and the other events of the trial which indicate that the defendant does not contest the fact that he committed the act alleged in

the indictment. The only issue now remaining in the case is whether or not the defendant was legally sane, legally responsible for his criminal act on that date.

"Having admitted the commission of the crime, ordinarily I would not have to go into the details of the acts which he committed at that time, but, however, on the question of sanity, I would like to bring this to you and remind you it's a question of his sanity on December 16, 1963. Was he legally sane on that date? That is the question for you to determine. You may consider all of the evidence which has been introduced, but you come right back to the focal point, was he legally sane and criminally responsible for his act on December 16, 1963?

"In order to determine that, you must examine what he did, how he did it, what were his actions, what was his condition at that time. *You may also consider acts previously, and acts after December 16, but you come right back to the point of what was his condition on December 16, 1963.*

"Now, we have introduced evidence showing that the automobile he was driving on December 16, 1963, came from New York. Here is Exhibit 8, the Rental Contract for that automobile in the name of Arthur Cooper. Here is a traffic ticket, City of New York, showing that the automobile was in New York City. I am trying to find the date on this ticket. I had it at one time on December 14 of 1963. We showed you receipts for gasoline along the route between New York to St. Louis. We have here a receipt from the Western Union showing telegraphing of the money from Harrisburg, Pennsylvania, to New York City, to Mrs. Patiricia [sic] Scott, on December 15th.

"These are some of the things showing what he was doing when he was coming from New York to St. Louis in this automobile, and when he gets to the vicinity of St. Louis, he stops in Alton, Illinois, and he uses the name Arthur Cooper, the same name that is on the rental contract, for the purpose of purchasing a revolver which was registered in the name of Arthur Cooper with the gun sales company.

"At that time he displayed no nervousness. His conversations with the salesman at the time he was making that purchase appeared to the salesman to be perfectly normal. I think there was some testimony that he was purchasing it for the purpose of a gift to his son, but all of that activity so far seems perfectly normal."

.

(Emphasis added) (A. 122 through 124).

The defendant was found guilty by the jury on August 27, 1964, and was sentenced on that same day to a term of 20 years (T. 481, 482).

A direct appeal in Kaufman's behalf to the United States Court of Appeals for the Eighth Circuit *in forma pauperis* and attorneys Barsanti and Singer were granted leave to withdraw (R. Cr. 83-85): Attorney Walter E. Diggs, Jr., of St. Louis, was appointed to represent Kaufman in the appeal.

Upon the appointment of Mr. Diggs, Kaufman wrote to him from New York (where he was then confined on an unrelated matter), and told Mr. Diggs that there were several points which should be raised in the appeal, including the issue of whether or not evidence obtained from his

person and his car subsequent to his arrest should have been excluded as evidence at his trial. (See affidavit of Harold Kaufman in Appendix B of this brief, *infra*.)

In his briefs and in oral argument which took place on March 9, 1965, Mr. Diggs did not raise any search and seizure issue, considering such issue to be without merit. (See affidavit of Walter E. Diggs, Jr., included in this brief as Appendix C, *infra*.) On April 26, 1965, Harold Kaufman wrote a letter to Mr. Diggs, in which, among other things, he said the following:

"... I have discovered a very serious and prejudicial error in the trial. I have also found the leading and most recent Supreme Court decision on this. I feel if nothing else this could guarantee a new trial.

"... [T]here were timely and many objections to the introduction of the evidence that were [sic] taken from the car. Also the money that was taken from my coat, that I was no longer wearing. The main and pertinent part is that I was arrested at 4:00 P. M. in the a place [sic] the car was seized and taken to a garage under police custody and searched at 6:00 to 8:00 P. M. without a search warrant by the F.B.I. and the local police. In *Preston v. U. S.*, ... adjudicated on March 23, 1964. I am certain as you read this case, and read the transcript you will come to the conclusion this was a blatant violation of my Constitutional rights in the search of the car. ...

"The problem how [sic] can we make it timely again? I leave this too [sic] you."

(This letter is set out in its entirety in Appendix D of this brief, *infra*.)

On June 13, 1966, Kaufman filed a motion to vacate sentence under 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Missouri (A. 3 through 11). Attorney A. H. Hamel, of Clayton, Missouri, was appointed to represent Kaufman, and Hamel filed a supplemental motion to vacate on September 9, 1966 (A. 12 through 14). In the supplemental motion attorney Hamel alleged, among other grounds, that all physical evidence taken from the Rambler after Kaufman's arrest had been obtained through an unlawful search and seizure (A. 13).

An evidentiary hearing was held on the motion and supplemental motion and, on March 16, 1967, the district court filed a memorandum opinion and order denying the motion and supplemental motion (A. 17-26). This opinion is reported at 268 F. Supp. 484 (1967). Only the following brief reference was made, in that opinion and order, to the search and seizure issue:

.

"The supplemental motion to vacate, prepared by appointed counsel, asserts as a further ground for relief that certain physical evidence was obtained by an allegedly unlawful search and seizure of Kaufman's automobile after his arrest. The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion. See *Warren v. United States*, 8 Cir., 311 F.2d 673, 675 (1963); *Springer v. United States*, 8 Cir., 340 F.2d 950 (1965)" (A. 21).

On March 27, 1967, the district court entered an order refusing to allow Mr. Kaufman to appeal *in forma pauperis* from the order of March 16, 1967 (R. C. 86). On May 11,

1967, the United States Court of Appeals for the Eighth Circuit denied his motion for leave to proceed on appeal *in forma pauperis* from the decision of the district court (R. C. 88). Motion for rehearing was denied by the Eighth Circuit on August 7, 1967. (See Exhibit "C" attached to the petition for writ of certiorari filed in this cause on November 6, 1967.) It is the decision of the United States Court of Appeals, denying petitioner's motion to appeal *in forma pauperis* from the district court's decision of March 16, 1967, which is under review in the present proceeding.

Summary of Argument

The exclusionary rule, under which evidence obtained illegally by police is inadmissible in the trial for a criminal offense, only recently became a constitutional requirement. Prior to 1961 the exclusionary rule was a mere rule of court or rule of evidence.

Federal habeas corpus for state prisoners and 28 U.S.C. § 2255 (the federal inmate's equivalent of habeas corpus), can only be used to attack criminal convictions and sentences on jurisdictional or constitutional grounds. Historically these remedies have not been available to correct mere evidentiary errors which took place at the trial. These errors can ordinarily be reviewed only through direct appeal.

Prior to the time the exclusionary rule became a matter of constitutional law, the courts refused to allow federal inmates to raise questions arising under the exclusionary rule through the use of § 2255. Since 1961, even though questions arising under the exclusionary rule are now constitutional questions, some of the United States courts of

appeal still refuse to allow these illegal search and seizure questions to be raised by collateral motion to vacate under § 2255. At least two circuits, on the other hand, now allow federal inmates to raise such issues in § 2255 proceedings on the ground that 2255 should be available to raise any issue regarding infringement of constitutional rights. It is submitted that this is the proper view.

This Court has said that the remedy provided the federal inmate under § 2255 must be as broad and effective as the remedy which is available to the state prisoner through federal habeas corpus. In fact, there would be grave doubts concerning the constitutionality of § 2255 if a federal inmate using that remedy were provided a less effective remedy than that provided under the constitutional provision guaranteeing the right to habeas corpus and statutes implementing that constitutional provision.

This Court and many of the lower federal courts have recognized, either expressly or tacitly, that questions arising under the exclusionary rule may be raised by state prisoners through the use of federal habeas corpus. Since the remedy under § 2255 must be as broad and effective as the remedy of habeas corpus, it is clear that federal inmates should have an equal right to raise illegal search and seizure questions through § 2255.

Petitioner was denied the right to appellate review of the illegal search and seizure issue which, he had consistently maintained, had merit. His appointed appellate attorney did not raise the point in the briefs or oral argument before the court of appeals, even though petitioner had suggested to him that the point be raised. Then, after oral argument, petitioner wrote to the attorney and again asked that the point be raised. The attorney went to the clerk of

the court, who incorrectly advised the attorney that there was no formal way of raising the issue at that time, but that if the attorney would forward petitioner's letter to him, he would submit the letter to the panel of judges considering the case. The attorney did so, and the letter was given to the panel; but, in its opinion several months later affirming petitioner's conviction, the court was silent on the illegal search and seizure issue. Thus, the issue was not considered, through no fault of petitioner. Petitioner was deprived of his right to appeal, his right to effective representation by counsel on this issue, and has been deprived of due process. He is entitled to a review of the illegal search and seizure issue and the means available to him to obtain a review of this issue is the remedy provided by 28 U.S.C. § 2255.

Evidence was taken through a search of petitioner's person at the police station some time after his arrest on a traffic charge. Also, evidence was taken during a search of the car, which he had had lawful permission to use, at a garage where it had been towed, some time after the arrest and some distance away from the place of the arrest and the place where petitioner was being detained. Neither of these searches was based upon a warrant. These searches were too far removed from the time and place of the arrest and cannot be considered valid as incident to his arrest. The evidence thus found was used against petitioner at his trial for robbery of a savings and loan association on the controverted issue of whether or not he was insane at the time of the crime. The evidence was highly prejudicial to him on this issue and contributed to his conviction. He has thus been unfairly convicted and sentenced to a term of twenty years.

A R G U M E N T

1.

A Sentence Based Upon Evidence Obtained Through an Unreasonable Search and Seizure in Violation of the Fourth Amendment Is Subject to Collateral Attack Under 28 U.S.C. § 2255.

A. THE EIGHTH CIRCUIT AND SOME OF THE OTHER CIRCUITS FOLLOW THE RULE THAT ILLEGAL SEARCH AND SEIZURE CLAIMS CANNOT BE RAISED BY § 2255.

The United States District Court for the Eastern District of Missouri, in its opinion denying petitioner relief under 28 U.S.C. § 2255, stated that Kaufman's allegation in his motion to vacate that certain items of physical evidence were obtained through an unlawful search and seizure of his car could not be considered in a collateral attack on his conviction under § 2255. In support of this statement the court cited *Warren v. United States*, 311 F.2d 673 (8th Cir., 1963) and *Springer v. United States*, 340 F.2d 950 (8th Cir., 1965). In these cases the United States Court of Appeals for the Eighth Circuit has indicated that the issue of whether illegally obtained evidence was improperly used against a criminal defendant at his trial is an evidentiary issue which can be reviewed only by appeal, and that § 2255 cannot be used as a substitute for appeal. See also, *Cox v. United States*, 351 F.2d 280 (8th Cir., 1965); *Gendron v. United States*, 340 F.2d 601 (8th Cir., 1965); and *Peters v. United States*, 312 F.2d 491 (8th Cir., 1963).

Some of the courts of appeal in other circuits also follow the strict rule that a claim of illegal search and seizure may not be raised collaterally under 28 U.S.C. § 2255.

For example, see *United States v. Re*, 372 F.2d 641 (2d Cir., 1967), cert. den., 388 U.S. 912 (1967); *United States v. Jenkins*, 281 F.2d 193 (3rd Cir., 1960); *Nash v. United States*, 342 F.2d 366 (5th Cir., 1965); *Armstead v. United States*, 318 F.2d 725 (5th Cir., 1963); *Eisner v. United States*, 351 F.2d 55 (6th Cir., 1965); *Thompson v. United States*, 315 F.2d 689 (6th Cir., 1963), cert. den., 375 U.S. 843 (1963); *DeWelles v. United States*, 372 F.2d 67 (7th Cir., 1967); *Kapsulis v. United States*, 345 F.2d 392 (7th Cir., 1965), cert. den., 382 U.S. 946 (1965); *Sinks v. United States*, 318 F.2d 436 (7th Cir., 1963), cert. den., 375 U.S. 946 (1963); *Thomas v. United States*, 308 F.2d 369 (7th Cir., 1962); *Williams v. United States*, 307 F.2d 366 (9th Cir., 1962); *Hoffman v. United States*, 327 F.2d 489 (9th Cir., 1964).

B. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS RECENTLY ADOPTED A MODIFIED RULE ALLOWING SEARCH AND SEIZURE ISSUES TO BE RAISED UNDER § 2255 IN "EXCEPTIONAL CIRCUMSTANCES."

Prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), the United States Court of Appeals for the District of Columbia followed the general rule that illegal search and seizure issues are evidentiary in nature and may not be raised in a collateral attack against a sentence under § 2255. *Plummer v. United States*, 260 F.2d 729 (D.C. Cir., 1958); *Wilkins v. United States*, 258 F.2d 416 (D.C. Cir., 1958), cert. den., 357 U.S. 942 (1958); *Jones v. United States*, 258 F.2d 420 (D.C. Cir., 1958), cert. den., 357 U.S. 932 (1958); *Edwards v. United States*, 256 F.2d 707 (D.C. Cir., 1958), cert. den., 358 U.S. 847 (1958); and *White v. United States*, 235 F.2d 221 (D.C. Cir., 1956). That court, however, has modified its position in the 1966 case of

Thornton v. United States, 368 F.2d 822 (D.C. Cir., 1966). The court, speaking through Judge Leventhal, stated that, although ordinarily a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly a ground for collateral attack of his conviction, exceptional circumstances may warrant the use of § 2255 for the claim of unconstitutional search and seizure. Such circumstances would include claims such as ineffective assistance of counsel resulting in a denial of Sixth Amendment rights. In the case at hand no such circumstance was found and Thornton was denied relief. Judge J. Skelly Wright dissented from this opinion, being of the view that an illegal search and seizure raised in a § 2255 motion should be heard on the merits if the prisoner can demonstrate that a redetermination of this issue would serve the ends of justice and that his failure to assert the claim in his direct appeal did not amount to a deliberate bypass of federal remedies.

C. COURTS OF APPEAL IN AT LEAST TWO CIRCUITS HAVE TAKEN THE MORE LIBERAL VIEW THAT § 2255 IS AVAILABLE TO RAISE ILLEGAL SEARCH AND SEIZURE ISSUES.

There are at least two circuits in the United States that have indicated that illegal search and seizure issues can be raised by § 2255. The United States Court of Appeals for the Fourth Circuit, in *United States v. Sutton*, 321 F.2d 221 (4th Cir., 1963), stated that the question of whether evidence has been seized in violation of the Fourth Amendment is a constitutional question which can be raised on 2255, even though no appeal has been prosecuted in the case. According to that court, there is a clear distinction between constitutional and jurisdictional defects on the one hand

and ordinary trial errors, on the other. Constitutional issues should be cognizable under 28 U.S.C. § 2255.

In the case of *Gaitan v. United States*, 317 F.2d 494 (10th Cir., 1963), the issue of admissibility of illegally seized evidence was said to have a constitutional basis, and hence the remedy of § 2255 is available to raise this issue. The court pointed out that § 2255 is commensurate with the remedy available by habeas corpus.³ See also *United States v. Winstead*, 226 F. Supp. 1010 (N.D. Cal. 1964). It should be noted that § 2255 itself provides that a motion to vacate will lie if there has been a denial or infringement of the constitutional rights of the prisoner such as to render the judgment of conviction vulnerable to collateral attack. (See § 2255, set out in Appendix A of this brief.)

D. THE SCOPE OF THE REMEDY PROVIDED BY § 2255 MUST BE AS BROAD AND EFFECTIVE AS THE REMEDY OF HABEAS CORPUS.

Article I, Section 9, Clause 2 of the Constitution guarantees that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This constitutional provision has been implemented by the statutory provisions found in 28 U.S.C. § 2241, *et seq.* Prior to 1948 the application for a writ of habeas corpus was made before a judge in the district within which the prisoner was being held. This led to a disproportionate number of petitions

³ In both *Sutton* and *Gaitan* the courts affirmed decisions of district courts denying relief, under § 2255, to the prisoners involved. The statements in those cases broadening the scope of § 2255 to include attacks upon sentences on search and seizure grounds are, technically, *dicta*.

being filed before judges in districts in which federal prisons were located, and this created serious administrative problems. To correct this imbalance, Congress in 1948 enacted a complete revision of the habeas corpus provisions of Title 28. The purpose of § 2255 was to provide an expeditious remedy for correcting erroneous sentences. [See reviser's note following 28 U.S.C.A. § 2255 (1959).] The terms of § 2255 render an application under its provisions a prerequisite to application for a writ of habeas corpus unless the remedy under § 2255 is inadequate or ineffective. In actual practice § 2255 has been almost the exclusive remedy available to federal prisoners, since the circumstances in which § 2255 has been held inadequate or ineffective are extremely rare. The replacement of habeas corpus by § 2255 was not meant in any way to affect or diminish the scope of the remedy available to federal prisoners. In the case of *United States v. Hayman*, 342 U.S. 205 (1952), this Court, after tracing the legislative history of § 2255, pointed out that the sole purpose of § 2255 was to minimize the difficulties encountered in habeas corpus by affording the same rights in another and more convenient forum, 342 U.S. at 219. Since *Hayman*, this Court has reaffirmed that the scope of the remedy afforded by § 2255 must be commensurate with the remedy provided by habeas corpus, *Sanders v. United States*, 373 U.S. 1 (1963). In *Sanders*, this Court, speaking through Mr. Justice Brennan, pointed out that 2255 is as broad a remedy as habeas corpus:

"... Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions..." (373 U.S. at 13).

• • • • •

"... Indeed, if he [a prisoner invoking § 2255] were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than federal habeas corpus, the gravest constitutional doubts would be engendered, ... " (373 U.S. at 14).

Accordingly, the scope of the remedy provided by § 2241, on the one hand, and § 2255, on the other hand, must be equal.

E. HABEAS CORPUS MAY BE USED TO ATTACK A CONVICTION ON CONSTITUTIONAL GROUNDS AS WELL AS ON JURISDICTIONAL GROUNDS.

Habeas corpus in federal courts is not restricted to cases where the judgment of conviction is jurisdictionally void, but extends also to exceptional cases in which there has been a disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights, *Waley v. Johnston*, 316 U.S. 101 (1942). See also *Fay v. Noia*, 372 U.S. 391, 404-415 (1963).

F. AT LEAST SINCE *MAPP V. OHIO*, THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT HAS BECOME A CONSTITUTIONAL RULE RATHER THAN A MERE RULE OF EVIDENCE, AND SEARCH AND SEIZURE ISSUES CAN THEREFORE BE RAISED ON HABEAS CORPUS.

In 1961, in the case of *Mapp v. Ohio*, 367 U.S. 643 (1961), if not before that time, the exclusionary rule of the Fourth Amendment was elevated to the status of a constitutional requirement. It would seem, therefore, that at least since 1961, allegations concerning the use of illegally seized

evidence can and should be cognizable by habeas corpus. This is, in fact, the case. For instance in the very recent case of *Carafas v. LaVallee*, 36 L.W. 4409 (1968), the petitioner, a state prisoner, had filed an application for habeas corpus in a federal district court, alleging that illegally seized evidence had been used against him in his state trial. His application was dismissed, the United States Court of Appeals for the Second Circuit denied the petitioner's application for relief to appeal *in forma pauperis* and dismissed the appeal. Before this Court, on certiorari, the question of whether his case was moot was resolved in the petitioner's favor. Implicit in the holding of this Court is the premise that illegal search and seizure questions can be raised, at least under some circumstances, through federal habeas corpus.

In *Henry v. Mississippi*, 379 U.S. 443 (1965), the petitioner, a Mississippi state defendant, had raised an illegal search and seizure question during the trial and during the appeal of his case in state courts. The Supreme Court of Mississippi upheld his conviction and this Court granted certiorari. Although the case did not reach this Court on review of a decision in a habeas corpus or collateral proceeding, the following statement was made in the opinion:

"... [P]etitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. ..." (379 U.S. at 452)

There are a number of lower federal court cases in which prisoners filing petitions for habeas corpus have raised the

issue of whether or not they have been improperly convicted on the basis of illegally seized evidence. For example, see *U. S. ex rel. DeNegris v. Menser*, 247 F. Supp. 826 (D.C. D. Conn. 1965), *aff'd* 360 F.2d 199 (2d Cir., 1966); *United States ex rel. West v. LaVallee*, 335 F.2d 230 (2d Cir., 1964); *United States ex rel. Angelet v. Fay*, 333 F.2d 12 (2d Cir., 1963); *Saulsbury v. Green*, 347 F.2d 828 (6th Cir., 1965); *California v. Hurst*, 325 F.2d 891 (9th Cir., 1963); *Wilson v. Porter*, 361 F.2d 412 (9th Cir., 1966); *Dillion v. Peters*, 341 F.2d 337 (10th Cir., 1965); and *Coleman v. Maxwell*, 351 F.2d 285 (10th Cir., 1965).

G. CONCLUSION.

As pointed out in the *Hayman* case and in the *Sanders* case, *supra*, § 2255 should be considered fully as broad a remedy as the remedy of habeas corpus or else serious constitutional questions will be raised regarding suspension of the constitutional right to habeas corpus. State inmates, using the remedy of habeas corpus, and federal inmates, using § 2255, should be treated equally and, since a state inmate can raise illegal search and seizure questions through the medium of habeas corpus, the federal inmate should have the right to raise the same issues through the use of § 2255.

Section 2255, by its very terms, provides that a Federal prisoner must utilize 2255 and is not eligible for relief by habeas corpus unless it appears that 2255 is "inadequate" or "ineffective" to test the legality of his detention. If 2255 is not available to a federal inmate to raise the issue of whether his conviction was based on illegally obtained evidence, the inmate should be entitled to bypass 2255 and present this ground by habeas corpus. In fact, in the in-

stant case, we submit that the United States District Court for the Eastern District of Missouri, after determining that Kaufman was not entitled to raise his search and seizure issue under 2255 under Eighth Circuit decisions, should have then considered Kaufman's motion as a petition for writ of habeas corpus and in that way should have provided him a review of his search and seizure claims.

2.

Failure of Court of Appeals, in Petitioner's Direct Appeal From His Conviction, to Consider Issue of Improper Search and Seizure Which, on Suggestion of Court of Appeals' Clerk, Was Raised by Court-Appointed Appellate Counsel in Letter to Court of Appeals Subsequent to Oral Argument, Entitled Petitioner to a Consideration of the Search and Seizure Issue in a Proceeding Under 28 U.S.C. Section 2255.

A. EVERY CONVICTED CRIMINAL DEFENDANT HAS THE RIGHT TO APPEAL AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN HIS APPEAL.

Every convicted federal criminal defendant has a statutory right to appeal, *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962), and a right to representation by counsel in such appeal, *Ellis v. United States*, 356 U.S. 674 (1958); and *Johnson v. United States*, 352 U.S. 565 (1957). See also *Douglas v. California*, 372 U.S. 353 (1963). The right to counsel, during every stage at which such right exists, means the right to effective assistance of counsel, *Powell v. Alabama*, 287 U.S. 45 (1932).

B. RECENT CASES INVOLVING LOSS OF RIGHT TO APPEAL.

In *Fallen v. United States*, 378 U.S. 139 (1964), the defendant had been represented at the trial by a court-appointed attorney. During sentencing the defendant asked the court if he could appeal his case "as an insolvent," and he was told by the trial judge that he could. After sentencing the defendant asked the attorney if he would represent the defendant on appeal. The attorney said that he would not and advised the defendant to secure another attorney promptly so as not to forfeit his right of appeal. The day after sentencing the defendant was transferred to the United States Penitentiary in Atlanta. During the ten-day period for taking an appeal he wrote a letter to the clerk of the trial court asking for a new trial and an appeal. This letter was apparently placed in the mail at the prison by defendant within the time for taking an appeal. Fourteen days after the sentencing, the clerk of the trial court received the letter. The defendant's appeal was not timely and was therefore dismissed. On certiorari to this Court the decision was reversed. The defendant had done all he could, under the circumstances, to give notice within the required time period, and it was held that under these circumstances he should be allowed to appeal. Although this case involved an entire loss of the right to appeal, while in the case at hand we are concerned with the loss of the right to effectively present an important issue or ground for reversal, the cases are similar in that the defendants involved (*Fallen* and *Kaufman*) both lost their rights through no fault of theirs but through circumstances over which they had no control.

In 1967 this court decided two cases involving the failure, by appointed appellate counsel, to obtain adequate review,

on appeal, of defendants' cases. In the first of these, *Anders v. California*, 386 U.S. 738 (1967), defendant had been convicted in state court and counsel was appointed for him to take his appeal. However, after a study of the record and consultation with the defendant, the appointed counsel concluded that there was no merit to the appeal. He so advised the court by letter and, at the same time, informed the court that the petitioner wished to file a brief in his own behalf. At this point the defendant requested the appointment of another attorney. This request was denied and the defendant proceeded to file his own brief *pro se*. The conviction was affirmed. Six years later, the convicted prisoner filed an application for writ of habeas corpus in the California District Court of Appeals, asking to have his case reopened. In that application he raised the issue of deprivation of the right to counsel in his original appeal because of the court's refusal to appoint counsel at the appellate stage of the proceedings. That court denied the application. Anders then submitted a petition for writ of habeas corpus to the Supreme Court of California but the petition was denied by that court. This Court reversed the decision of the California Supreme Court, holding that the treatment received by the defendant did not comport with the requirements of the Fourteenth Amendment. Appointed counsel must act the role of an active advocate in behalf of his client, and his role as an advocate requires that he support his client's appeal to the best of his ability. If counsel finds the case to be without merit, after a conscientious examination of it, he should advise the court and request permission to withdraw. Such a request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of

the attorney's brief should be furnished the indigent and time allowed him to raise any points that he chooses. The court, not counsel, then should proceed, after a full examination of all of the proceedings, to decide whether the case is wholly frivolous. In the present case, Kaufman's appointed appellate counsel decided not to raise the illegal search and seizure issue even though Kaufman had requested that it be raised. Under such circumstances, the *Anders* case would seem to require that the appointed attorney file a brief on the point and give the court an opportunity to decide whether the issue is frivolous.

In *Entsminger v. Iowa*, 386 U.S. 748 (1967), the petitioner had been convicted in state court. A court-appointed attorney prepared and filed a notice of appeal. Under Iowa law there were alternative methods of appealing criminal convictions. The first method is an appeal on a "clerk's transcript." Under this procedure the clerk of the trial court would prepare and file a modified transcript of the proceeding below, containing only the indictment or information, the grand jury minutes, various orders and judgment entries of the court, but not the transcript of evidence. This practice was used in the absence of a request on the part of counsel for a plenary review of the case. If a request for a plenary review of his case was made, the appellant was provided an appeal on a complete record of the trial. Petitioner asked his appointed attorney to perfect a plenary appeal and counsel gave notice therefor. However, counsel, apparently believing that the appeal was without merit, failed to file the entire record of petitioner's trial although it had been prepared and although counsel had advised petitioner that he would file same. The Iowa Supreme Court took petitioner's case into consideration

on the clerk's transcript alone, and the conviction was affirmed by that court. On certiorari this Court reversed the decision of the Iowa Supreme Court. Justice Clark, speaking for the Court, said that:

" . . . Here there is no question but that petitioner was precluded from obtaining complete and effective appellate review of his conviction by the operation of the clerk's transcript procedure as provided in Iowa law. Such procedure automatically deprived him of a full record, briefs and arguments on the ~~bars~~^{bare} election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record of his case. By such action all hope of any [adequate and effective] appeal at all, . . . was taken from the petitioner" (386 U.S. at 752)...

From the *Anders* and *Entsminger* cases it is clear that a judgment on the part of appointed appellate counsel that an appeal or a ground for appeal lacks merit should not preclude a convicted defendant from obtaining a review of the grounds which he seeks to raise.

C. FACTS IN CASE AT BAR.

In the case at hand Kaufman, after conviction, was sent to New York on an unrelated matter and then to the United States Penitentiary in Atlanta. An attorney was appointed in St. Louis to represent him on appeal. Upon the appointment of his appellate counsel, Kaufman wrote to the attorney from New York and told the attorney that there were several points which should be raised in the appeal, including the issue of whether or not evidence obtained from his

person and his car subsequent to his arrest should have been excluded as evidence at his trial. (See Appendix B of this brief.) The appellate counsel, in his brief and in oral argument which took place on March 9, 1965, did not raise the search and seizure issue, considering it to be without merit. On April 26, 1965 Kaufman wrote a letter to the attorney asking that he raise the search and seizure issue in some way. The appellate attorney then went to the clerk of the United States Court of Appeals for the Eighth Circuit and discussed with the clerk the matter of raising the issue at that time. The clerk advised the attorney that in his opinion there was no formal way to bring the issue before the court at that time. However, he suggested that the attorney send Mr. Kaufman's letter to him requesting that it be brought to the attention of the court. The attorney sent Mr. Kaufman's letter to the court with a cover letter (see Appendices C and D of this brief). The court, in its opinion, which was filed in September, 1965, was silent on the search and seizure issue. The same appellate attorney then filed a petition for writ of certiorari in this Court in which he raised the search and seizure issue.

D. CONCLUSION.

Kaufman has been denied appellate review of a point, the illegal search and seizure issue, which he has consistently maintained has merit. He asked both before and after oral argument of the case that this point be raised. His appellate counsel did not raise the point, at least not at that time because his attorney did not believe that the point had any merit. The clerk of the United States Court of Appeals for the Eighth Circuit told appellate counsel that there was no formal way of raising the issue subsequent

to oral argument of the case. This advice was not altogether accurate, for appellate counsel could have raised this point by a supplemental brief or by a motion for reargument of the case or by some other type of extraordinary motion. The United States Court of Appeals for the Eighth Circuit had the issue before it several months prior to the time they issued their opinion in the case, but in their opinion they were silent on the issue. Thus, Harold Kaufman, through no fault of his own, has been denied review of this issue due to failure of his appellate attorney to raise it in a proper way at the proper time, through inaccurate advice from the clerk of the United States Court of Appeals for the Eighth Circuit, and through failure of the court itself to consider the issue even after it had been raised informally. He has thus been deprived of due process and effective representation by counsel, at least on this one issue.⁴ Under these circumstances it cannot be said that he has waived his right or lost his right to a review of this issue, and the means left to him to obtain a review of this issue is through the remedy provided by 28 U.S.C. § 2255.

⁴ In all fairness, it should be pointed out appointed appellate counsel did an excellent job in briefing and presenting those points which he did raise in Kaufman's behalf.

3.

Evidence Obtained Through a Warrantless Search of Petitioner's Automobile Several Hours After His Arrest for a Traffic Violation, in a Garage Located Some Distance From the Place of Arrest and Some Distance From the Place at Which Petitioner Was Being Detained, Was Not Properly Admitted in Evidence Against Petitioner at His Trial for Robbery of a Savings and Loan Association. Further, Evidence Obtained Through a Search of Petitioner's Person at the Police Station After His Arrest on the Traffic Charge Was Not Properly Admitted Against Him.

A. FACTS SURROUNDING THE SEARCH OF THE RAMBLER.

As pointed out in the Statement of the Case and Facts, above, Harold Kaufman was arrested on a traffic charge at about 4:40 P.M., taken to the city police station, and his car was towed away to a garage. At this time Kaufman was suspected of no greater crime than being involved in a "hit and run" accident on the Missouri side of the Mississippi River. The garage owner entered the car and found the pistol which had been used in the robbery. He called the police and he removed the pistol after making his phone call. It is not clear from the facts whether a policeman was present at the time of the removal of the pistol or not.

In the meantime, at the police station, Kaufman was searched by city police. On his person the police found \$352.00 in currency and an auto rental contract showing that the car which he had been driving had been rented to one Arthur Cooper.

The F. B. I. sent agents to Alton to investigate Kaufman in connection with the robbery of the Savings and Loan

Association in Missouri. The only link between Kaufman and the robbery was the fact that, after the time of the robbery, he had driven out of Missouri on a major highway which led across the Mississippi River into Illinois and he had been involved in a hit-and-run accident along the route. One of the F. B. I. agents went to the Alton police station and after 6:30 P.M. was given the money and the auto rental contract which had been taken by the police. At 9:00 o'clock two other F. B. I. agents arrived at the garage and made a thorough, two-hour, search of the car, obtaining further evidence including stolen traveler's checks, a New York City traffic ticket, two receipts for gasoline which had been purchased the day before in Pennsylvania, showing the route which Kaufman had followed in traveling to the St. Louis area, and a receipt showing that he had sent a Western Union money order to his girl friend, a woman in New York City, the day prior to the robbery. Also, there was found in the car during this search a receipt showing the name of the gun shop at which the pistol used in the robbery had been obtained earlier that day.⁵ Neither the F. B. I. nor the Alton police had a search warrant for the search of the car or Kaufman's person.

B. PRESTON v. UNITED STATES AND OTHER CASES INVOLVING SEARCHES OF AUTOMOBILES LOCATED SOME DISTANCE FROM THE PLACE OF ARREST.

In *Preston v. United States*, 376 U.S. 364 (1964), the petitioner and two others had been arrested for vagrancy while sitting in a parked car late at night. The car was towed to a garage without being searched. In a later search at the garage, made without a warrant, police found two

⁵ See footnotes 1. and 2., *supra*.

loaded revolvers, women's stockings with mouth and eye holes, and an illegally manufactured license plate designed to be snapped over another license plate. These articles which had been taken from the car were introduced against the defendant at his subsequent trial and he was convicted of robbery of a federally insured bank. On appeal to this Court, the conviction was reversed. The search of the car took place several hours after the occupants had been arrested, the arrest was for a minor, non-dangerous offense, and the search was too remote in time and place to have been incident to the arrest and, therefore, was illegal. Consequently any evidence obtained during such a search was inadmissible under the federal exclusionary rule. The Court, speaking through Mr. Justice Black, said:

" . . . Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. . . . Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car was stolen, the police had the right to search the car when they first came on the scene. But this does not decide the question of reasonableness of a search at a later time and at another place. . . ."

See also, *Stoner v. California*, 376 U.S. 483 (1964).

During this last term, this Court decided a case having a factual situation very similar to the facts involved in the *Preston* decision and in the case at bar. The case we refer to is *Dyke v. Taylor Implement Manufacturing Co.*, 36 L.W. 4436 (1968). Defendants were being tried in a state court on a criminal contempt charge. Over their objection the court admitted in evidence an air rifle found by police offi-

cers in defendants' automobile as a result of a warrantless search, after their arrest for a traffic offense, conducted while the defendants were in custody inside the courthouse and their automobile was parked on the street outside. They were convicted of the crime and the Supreme Court of Tennessee affirmed the conviction. On certiorari the decision was reversed on the ground that under the Fourth and Fourteenth Amendments the admission of the air rifle was improper, since the warrantless search was not justifiable as an incident to a lawful arrest. The search of the car was too remote in time and place from the arrest to be considered incident to the arrest.

In the case of *Williams v. United States*, 382 F.2d 50 (5th Cir., 1967), the defendant fled upon being approached by postal inspectors who had been keeping him under surveillance because they suspected him of stealing United States Treasury checks from the mails. His abandoned automobile was impounded by city police, but it was held that this did not authorize postal inspectors to search the automobile without a warrant, since such a search was not incident to any arrest and did not relate to the nature and purpose of the custody of the impounded automobile. The stolen checkbook which was found in the automobile was held to be inadmissible by the United States Court of Appeals for the Fifth Circuit. This case is of importance in the present case because it indicates that, even if it could be found that the Alton city police were justified in searching the automobile driven by Kaufman, the F. B. I. certainly had no right to search the car at the garage in Alton.

There are two other cases which have been decided recently by this Court concerning searches of automobiles not incident to an arrest. The first of these is *Cooper v. California*, 386 U.S. 58 (1967). Cooper was arrested on a

narcotics charge. There was evidence that he had used his car in connection with this offense. A week after the arrest evidence was found in the glove compartment of his car, which had been impounded and held in a garage. California had a forfeiture statute under which the entire car had been forfeited to the state as evidence. The *Preston* case is distinguishable from *Cooper* in that in the *Cooper* case the car was being held under a state forfeiture statute under which the police were to hold the car as evidence. If the state was justified in holding the entire car as evidence it certainly was justified in searching through any part of the car. In *Preston* the police had arrested the petitioner for vagrancy but had held the car because they believed it might have been stolen. The *Cooper* case is clearly distinguishable from the facts in the instant case because we are not here dealing with the forfeiture statute such as that in effect in California. The facts in our case are much closer to those involved in *Preston*.

Harris v. United States, 36 L.W. 4195 (1968), involved a District of Columbia police department regulation requiring officers taking an impounded vehicle in charge to inventory the vehicle thoroughly, to remove all valuables from it, and to attach to the vehicle a property tag listing certain information about the circumstances of the impounding. A police officer, acting under the authority of this regulation, found evidence of an automobile registration card belonging to a robbery victim. He discovered this card on the metal stripping under the door of the automobile, while he was taking measures to protect the car under the above-stated regulation. This Court ruled that the finding of this card, under these circumstances, could not be considered the result of a search. This object was found in plain view of the officer during a legitimate inventory of

the car authorized under the police regulation. In the *Kaufman* case there is no mention, in the record, that the Alton police had a regulation such as the regulation involved in *Harris*. And, even if so, we do not know whether Cliff Martin, the operator of the garage where the car was impounded, had authority under this regulation.

C. THE PISTOL

The first item taken from the car was the pistol. From the transcript it appears that Martin was a private citizen. The pistol, therefore, might not be subject to the sanction of the exclusionary rule, since the exclusionary rule has been viewed as a restraint upon the activities of sovereign authority and not a limitation upon searches by private individuals, *Burdeau v. McDowell*, 256 U.S. 465 (1961). However, it can be argued that *Burdeau v. McDowell* should no longer be followed and that searches by private individuals should be covered under the exclusionary rule as well as searches by police. The purpose of the exclusionary rule is to deter unlawful invasions of privacy, and the rule is as necessary to protect individuals against invasions of their privacy by private individuals as it is to protect them against such invasions by police. If the gun was obtained illegally it should not have been admitted as evidence against the defendant and, further, if the identity of the gun shop from which the pistol had been purchased was ascertained through the tracing of the serial number on the pistol, the testimony of the operator of the gun shop, John Davis, who testified concerning Kaufman's calmness during the time he was purchasing the gun shortly before the robbery (in rebuttal against Kaufman's insanity defense), would have been excludable from evidence as the fruit of an illegal search and seizure.

It is true that Kaufman's trial attorney did not object to the admission in evidence of the pistol but this was such a harmful piece of evidence against Kaufman that, if it can be shown that the gun was obtained through an illegal search and seizure, the decision by his attorney not to object to its introduction should not be considered binding upon Kaufman. The pistol was a very damaging piece of evidence at the trial. The jury must have been affected by the calmness by which Kaufman had acquired the gun, and the display of the gun in the courtroom. The actual viewing of the gun is a lot different than talking about it in the abstract. It looks much more deadly being held in someone's hand and being talked about than when someone is just talking about a gun. The admission of this gun against Kaufman was extremely prejudicial to Kaufman.

D. THE EVIDENCE FOUND ON THE FLOOR BOARD OF THE CAR.

The items found on the "floor board" of the car were found by the F. B. I. through an illegal search and seizure and therefore should not have been admitted in evidence against the defendant. His attorney objected to all of these items except the travelers' checks.* There is one item found in the automobile which was prejudicial to Kaufman although this item was not introduced as evidence against him at his trial. We refer to the receipt showing that he had purchased the pistol at the Wittel Gun Shop in Alton on the same day as the robbery. This receipt may have provided the information which led the police to Mr. John Davis, the operator of the gun shop, who gave very damag-

* The failure of Kaufman's attorneys to object to the travelers' checks, which were the "fruits" of the crime, may have amounted to less than the effective assistance of counsel, which is required under the Sixth Amendment [see *Powell v. Alabama, supra*, and *People v. Ibarra*, 34 Cal. Rptr. 863, 386 P.2d 487 (1963)].

ing testimony against Kaufman at his trial. It will be recalled that Mr. Davis testified that Kaufman had been calm, logical, coherent, and entirely competent shortly before the robbery. This evidence was damaging on the issue of insanity, which was Kaufman's sole defense in his case. Furthermore, the receipts for gasoline and the receipt for a money order sent by Western Union which showed the route that Kaufman had traveled in driving from New York City to the St. Louis area were used by the prosecution on the issue of insanity. As has been pointed out in the Statement of the Case and Facts, *supra*, the prosecution used these bits of evidence to establish that Kaufman had been competent enough and sane enough the day before the robbery to drive all the way from New York City to St. Louis. Kaufman's attorney objected to these pieces of evidence on the ground that they had been obtained through an illegal search and seizure, and his objections should not have been overruled by the trial court.

E. THE EVIDENCE TAKEN FROM KAUFMAN'S PERSON AT THE POLICE STATION.

After Kaufman's arrest on a traffic violation he was taken to the police station and was there "searched" by the Alton police. The record does not indicate that this was an inventory of the contents of his clothing but, rather, was a search for the purpose of obtaining evidence. This search was made without a warrant and, of course, it was made some time after the arrest and at some distance from the scene of the arrest on the traffic charge. At this time the police had no probable cause to believe that Kaufman had been involved in the bank robbery. All they had was the request from the Missouri side of the Mississippi River

to arrest a man driving a red Rambler because that man had been involved in a "hit-and-run" accident.

Under these circumstances the search of Kaufman's clothing on his person was unreasonable and the evidence obtained in this search, namely, the auto rental contract showing that the car he had been driving was rented to Arthur Cooper and the currency, the proceeds of the bank robbery, should not have been admitted in evidence against him. As was said in the case of *James v. Louisiana*, 382 U.S. 36 (1965), a search can be valid if it is based on a valid search warrant or if it is "incident to an arrest." However, a search can only be incident to an arrest if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. Once an accused is under arrest and in custody, a search made at another place, without a warrant, is simply not incident to the arrest and the fruits of such a search cannot be admitted as evidence against the defendant.

In the case at bar, Kaufman was under arrest for a traffic charge, and at the time of the search was some distance away from the place of arrest. Therefore the evidence obtained from his person should not have been introduced in evidence against him. It should be pointed out that the admissions of these items of evidence were objected to at the trial by the defendant's attorney.

F. DEFENDANT KAUFMAN HAD STANDING TO OBJECT TO THE ADMISSION, AT THE TRIAL, OF ITEMS TAKEN FROM HIS CAR AND HIS PERSON.

In *Jones v. United States*, 362 U.S. 257 (1960), this Court held that, at least in the case in which the defendant is being tried for possession of narcotics, he does not need

to admit that he owned or was in possession of narcotics in order to gain standing to suppress, as evidence, the illegal narcotics. Of course that decision involved a factual situation unlike the situation in the case at hand, but it does indicate the need for and trend toward relaxing the older, strict standing requirements in search and seizure cases.

In the case of *Simmons v. United States*, 36 L.W. 4227 (1968), this Court, speaking through Mr. Justice Harlan, stated that standing requirements have been relaxed in two alternative ways in the *Jones* case:

“ . . . First, we held that when, as in *Jones*, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. . . . ”

It would seem that, based on the above statement, since Kaufman was in possession of the car which he had been driving and since that possession was legitimate, he had standing at the trial to object to the evidence obtained from the car. The Rambler had been rented in New York by a friend of Kaufman's named Arthur Cooper. Cooper rented the car for the sole purpose of allowing Kaufman to use it, and upon renting the car in his name he turned the car over to Kaufman. Kaufman sent a money order for \$50.00 by Western Union telegraph from Pennsylvania to New York to his girl friend, Mrs. Patricia Scott, on Sunday,

the day before the robbery. At the same time he telephoned her and asked her to cash the \$50.00 with Cooper and to give Cooper \$30.00 of the cash for the purpose of extending the time period of the lease on the car.' Thus Kaufman was using the car with the complete consent of the person who had legitimately leased it.

In 1955 California adopted the exclusionary rule and shortly thereafter the Supreme Court of California dealt with the standing requirement in the case of *People v. Martin*, 45 Cal.2d 755, 290 P.2d 855 (1955). Justice Traynor, speaking for the court, indicated that since the purpose of the exclusionary rule was to prevent unlawful police activity, any procedure which facilitates these illegal practices should therefore be prohibited. He stated that: "Since all of the reasons which compel us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights. . . ." (290 P.2d at 857). As was mentioned in the *Simmons* case, *supra*, in footnote 12 of the opinion, it can be argued that the "police deterrent" rationale for the exclusionary rule logi-

' This information is corroborated by the affidavit of Patricia Scott (A. 15, 16), in which she stated:

" . . . I, together with Arthur Cooper, on or about December 14, 1963, cashed a Western Union money order to pay for the rental of the red Rambler automobile used by Harold Kaufman; and further, Arthur Cooper authorized Harold Kaufman to use the aforesaid automobile that he was driving at the time he was apprehended for the holdup of the Roosevelt Federal Savings and Loan Association on December 16, 1963; . . . "

The information was also corroborated during a telephone conversation between undersigned counsel Jacob and petitioner Kaufman, on August 1, 1968.

cally dictates that defendant should be able to object to the admission against him of any unconstitutionally seized evidence.

Certainly Kaufman in the instant case had control of the Rambler, at the time he was arrested, and he had a sufficient interest in everything seized within the car to object to its introduction into evidence against him. The United States Court of Appeals for the Tenth Circuit, in *Weed v. United States*, 340 F.2d 827 (10th Cir., 1965), found that a defendant did have standing to object to evidence obtained from a rented automobile which the defendant possessed, apparently lawfully. Based on this case and the above cases, it is clear that Kaufman had standing to suppress or object to the introduction of the evidence which was obtained from the car which he had been driving at the time of his arrest.

G. FAILURE OF KAUFMAN'S ATTORNEY TO MAKE A PRE-TRIAL MOTION TO SUPPRESS DID NOT PRECLUDE HIM FROM RAISING HIS OBJECTIONS AT THE TRIAL.

It is clear that the failure of the attorney representing Kaufman at his trial to make a pre-trial motion to suppress evidence which had been obtained through an illegal search and seizure did not preclude him from raising objections to the admission of the evidence at the trial. See *Gilbert v. U.S.*, 307 F.2d 322 (9th Cir., 1962); *Wrightson v. United States*, 95 U.S.App. D.C. 390, 222 F.2d 556 (1955); and *Ganci v. United States*, 287 F. 60 (2d Cir., 1923), *cert. den.* 262 U.S. 755 (1923). It should be pointed out that Rule 41(e) of the Federal Rules of Criminal Procedure provides that although a motion to suppress should ordinarily be made before trial, the court in its discretion may entertain the motion at the trial or hearing.

It should be pointed out that in the case at bar the trial judge in denying defense counsel's objections to evidence which had been obtained through an illegal search and seizure did not base his rulings denying those objections on the fact that a pre-trial motion to suppress had not been made; rather, he apparently made his rulings on the merits of each respective objection or motion to exclude.

H. THE INTRODUCTION OF ILLEGALLY OBTAINED EVIDENCE AGAINST KAUFMAN WAS HIGHLY PREJUDICIAL AND DAMAGING TO HIS INSANITY DEFENSE.

In *Fahy v. Connecticut*, 375 U.S. 85 (1963), this Court said that in a search and seizure case, the question of whether or not the illegally seized evidence constituted harmless error or not is to be decided by asking the question whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Chapman v. California* case, 386 U.S. 18 (1967), involved the question of whether or not it was harmless error for the prosecuting attorney to comment on the failure of the defendant to testify. It was decided that before an error involving a denial of a federal constitutional right can be held to be harmless error in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

Under these tests it cannot be said that the introduction of evidence illegally obtained from Kaufman's car and his person was harmless error relative to his defense of insanity, since evidence was introduced to show that he was calm, coherent, logical, etc. shortly before the robbery (testimony of John Davis) and to show that he was com-

petent and sane enough to drive from New York to St. Louis the day preceding the robbery, send a telegram, etc. (Govt. Exs. 9-12).

In the trial of Kaufman's case there were two issues: (1) the question of whether or not he was the man who held up the Savings and Loan Association with a pistol; and (2) whether or not he was insane at the time he held up the Savings and Loan. Kaufman and his attorney conceded the first issue. This left only the issue of insanity to be determined by the jury. It is true, therefore, that the evidence which was introduced against Kaufman, the evidence which was illegally taken from the car and from Kaufman's person, could not have harmed Kaufman on the issue of whether or not he was the man who entered the Savings and Loan and used a pistol to obtain traveler's checks and currency. However, as has been shown throughout this brief, some of the illegally seized evidence was used against Kaufman specifically on the issue of insanity and we submit that it cannot be shown beyond a reasonable doubt that this evidence did not contribute to the finding of the jury that Kaufman was sane at the time of the incident, and there exists at least a reasonable possibility that the evidence complained of might have contributed to the conviction. Also the fruits of the crime (the money and travelers' checks) and the pistol certainly had a prejudicial effect against Kaufman on the controverted issue of insanity.

Conclusion

Undersigned counsel submit that the United States District Court for the Eastern District of Missouri, in its order dated March 16, 1967, was in error in failing to fully consider petitioner Kaufman's claims that he had been convicted on the basis of evidence obtained through an unlawful search and seizure. Likewise, the United States Court of Appeals for the Eighth Circuit was in error in denying petitioner's motion for leave to appeal *in forma pauperis*. It is requested: (1) that petitioner's present conviction for robbery of a federally insured savings and loan association be vacated and that he be granted a new trial; or (2) that the judgment of the United States Court of Appeals for the Eighth Circuit, and that of the United States District Court for the Eastern District of Missouri, dated March 16, 1967, be vacated and the cause remanded for a full consideration of the illegal search and seizure issues discussed in this brief.

Respectfully submitted,

BRUCE R. JACOB

WILLIAM F. C. SKINNER, JR.

Legal Assistance for Inmates Program
Emory University School of Law
Atlanta, Georgia 30322
Attorneys for Petitioner

(Assisted in the preparation of this brief by Attorney Thomas E. Baynes, Jr. and law students Fred W. Ajax, William C. Turner, William R. Rapoport, Charles R. Holman, Jr., William J. Terry and Dennis J. Lanahan, Jr.)

CERTIFICATE OF SERVICE

I, Bruce R. Jacob, certify that on the day of August, 1968, I served copies of the foregoing brief, upon Miss Bertrice Rosenberg, Criminal Division, Department of Justice, Washington, D.C.

APPENDIX A

Constitutional and Statutory Provisions Involved

1. Article I, Section 9, Clause 2 of the Constitution:

"The Privilege of the Writ of Habeas Corpus shall not be suspended."

2. Fourth Amendment to the Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, **APPENDICES** without probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Fifth Amendment to the Constitution:

"... [N]or [shall any person] be deprived of life, liberty, or property, without due process of law;

4. Sixth Amendment to the Constitution:

"In all criminal prosecutions the accused shall have the Assistance of Counsel for his defense."

5. 28 U. S. C. § 2241:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

APPENDIX A

Constitutional and Statutory Provisions Involved

1. Article I, Section 9, Clause 2 of the Constitution:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, . . ."

2. Fourth Amendment to the Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Fifth Amendment to the Constitution:

" . . . [N]or [shall any person] be deprived of life, liberty, or property, without due process of law; . . ."

4. Sixth Amendment to the Constitution:

"In all criminal prosecutions the accused shall . . . have the Assistance of Counsel for his defense."

5: 28 U. S. C. § 2241:

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

• • • • •

6. 28 U. S. C. § 2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

APPENDIX B

Affidavit of Harold Kaufman

STATE OF INDIANA)
COUNTY OF VIGO)

I, Harold Kaufman, being first duly sworn, hereby depose and say:

1. I am presently an inmate of the United States Penitentiary, Terre Haute, Indiana. I am the petitioner in the case of *Kaufman v. United States* previously No. 1281, Oct. Term 1967, now No. 53, Oct. Term, 1968, presently pending before the Supreme Court of the United States.

2. In 1964 I was convicted in the United States District Court for the Eastern District of Missouri of the crime of robbery of a federally insured savings and loan association. In 1964 and 1965 I took a direct appeal from this conviction to the United States Court of Appeals for the Eighth Circuit. An attorney named Walter E. Diggs, Jr. of St. Louis, Missouri was appointed by that Court to represent me in the appeal.

3. I have never seen Mr. Diggs and I have never spoken to him, either in person or by telephone. All contact between us during my direct appeal to the Eighth Circuit was through correspondence.

4. At the time Mr. Diggs was appointed to represent me in my direct appeal and until about March, 1965, I was confined on an unrelated matter in the Federal House of Detention in New York City.

5. Upon the appointment of Mr. Diggs I wrote to him from New York and to the best of my memory, I told him that there were several points which should be raised in

the appeal, including the issue of whether evidence obtained from my person and my car subsequent to my arrest should have been excluded as evidence at my trial.

6. I was transferred from New York to the United States Penitentiary in Atlanta in about March of 1965. I do not recall exactly when I received a copy of Mr. Diggs' brief, in my case, but, to the best of my knowledge, I did not receive a copy until after I arrived at Atlanta. On April 26, 1965, I wrote to Mr. Diggs, asking him to raise the illegal search and seizure issue before the Eighth Circuit in my behalf.

/s/ HAROLD KAUFMANN
Harold Kaufman

(Jurat omitted in printing)

APPENDIX C**Affidavit of Walter E. Diggs, Jr.**

STATE OF MISSOURI)
COUNTY OF ST. LOUIS)

I, Walter E. Diggs, Jr., being first duly sworn, hereby depose and say:

1. I am an attorney, engaged in the practice of law in St. Louis, Missouri.

2. I was the court-appointed attorney who, in 1965, represented Harold Kaufman before United States Court of Appeals for the Eighth Circuit in the direct appeal from his conviction in the Eastern District of Missouri of the crime of robbery of a federally insured savings and loan association.

3. I made my oral argument to the court in the above appeal on March 9, 1965. Following my oral argument in the case Mr. Kaufman, by letter to me dated April 26, 1965, raised the issue of illegal search and seizure. In his letter he cited several cases to me in support of his arguments. I had not raised the issue before the court, by brief or by oral argument, considering it to be of little merit. After carefully reading the cases cited to me in Kaufman's letter of April 26, I was still of the opinion that the illegal search and seizure issue was without merit. However, I determined to take every precaution to follow his desires, and accordingly, went to the court and discussed with the clerk the matter of raising the issue of illegal search and seizure at that time. Mr. Tucker, the Clerk of the Court, informed me that in his opinion there was no formal way to bring

the issue of illegal search and seizure before the court at that time. However, he suggested that I send Mr. Kaufman's letter to him, requesting that it be brought to the attention of the judge who had heard my argument. I followed his advice, sending Mr. Kaufman's letter to Mr. Tucker on June 17, 1965.

/s/ WALTER E. DIGGS, JR.
Walter E. Diggs, Jr.

(Jurat omitted in printing)

APPENDIX D

1. Letter from Robert Tucker to Bruce Jacob,
June 17, 1968

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT****St. Louis, Mo. 63101****ROBERT C. TUCKER, Clerk****June 17, 1968****Mr. Bruce R. Jacob
Assistant Professor of Law
Emory University
Atlanta, Georgia 30322****Re: No. 17834. Harold Kaufman v. United States of
America.****Dear Sir:**

• • • • •

"... I have examined the file and can state to you that I received a letter from Mr. Diggs dated June 17, 1965, with which he enclosed 3 letters received from Harold Kaufman, one of which was undated and the others being dated March 18, 1965, and April 26, 1965. I sent all of those letters to the panel to whom the case was assigned for opinion and do not have them any more. In his letter of June 17, Mr. Diggs stated ... 'you will notice that in his letter of April 26, 1965, that he has cited the case of

Preston v. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted.' . . ."

• • • • •
Very truly yours,

/s/ ROBERT C. TUCKER
Robert C. Tucker

2. Letter from Robert C. Tucker to Bruce R. Jacob,
July 12, 1968

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
St. Louis, Mo. 63101

July 12, 1968

Mr. Bruce R. Jacob
Assistant Professor
Legal Assistant for Inmates Program
Emory University School of Law
Atlanta, Georgia 30322

Re: No. 17834. Harold Kaufman v.
United States of America.

Dear Sir:

.

After writing you on June 17, 1968, I instituted inquiries among members of the Court concerning the correspondence referred to in my letter. I now think that I have re-assembled all of the correspondence in this case and I enclose to you herewith copies of the following:

1. Mr. Diggs' letter of June 17, 1965, with which he enclosed letters from the appellant dated March 18, 1965, April 26, 1965, and one undated.

.

Very truly yours,

Robert C. Tucker,
Clerk

3. Letter from Walter E. Diggs, Jr., to Robert C. Tucker,
June 17, 1965

(Letterhead of Grand, Peper and Martin, Attorneys
at Law, St. Louis, Missouri 63101)

June 17, 1965

Mr. Robert C. Tucker, Clerk
United States Court of Appeals
for the Eighth Circuit
United States Court & Custom House
12th & Market Streets
St. Louis, Missouri 63101

Re: No. 17834—Harold Kaufman
vs. United States

Dear Mr. Tucker:

I enclose herewith letters which I have received from Mr. Kaufman since I argued the above captioned cause on March 9, 1965. You will notice that in his letter of April 26, 1965 that he has cited the case of Preston vs. United States, which he contends indicates that there was a blatant violation of his constitutional rights in the search of his automobile following the armed robbery on which he was convicted.

I have written to Mr. Kaufman indicating that I have forwarded his letters to the court.

Very truly yours,

/s/ WALTER E. DIGGS, JR.
Walter E. Diggs, Jr.

**4. Letter from Harold Kaufman to his court-appointed
appellate attorney, April 26, 1965**

From: Harold Kaufman
88176

April 26, 1965

To: Mr. Walter Diggs, Jr. 407 N. Eighth Street
St. Louis, Missouri

Dear Mr. Diggs:

As we should be hearing from the Court of Appeals any day now, I have discovered a very serious and prejudicial [sic] error in the trial. I have also found the leading and most recent Supreme Court decision on this. I feel if nothing else this could guarantee a new trial.

Now as you will see in pages 61-110 of the transcript, there were timely and many objections to the introduction of evidence that were [sic] taken from the car. Also the money that was taken from my coat, that I was no longer wearing. The main and pertinent part is that I was arrested at 4:00 P.M. in one a [sic] place the car was seized and taken to a garage under police custody and searched at 6:00 to 8:00 P.M. without a search warrant by the F.B.I. and the local police. *Preston v. U.S.*, U.S. Supr. 305 F.2d 172, certiorary [sic] granted 373 U.S. 931 adjudicated on March 23, 1964. I am certain as you read this case, and read the transcript you will come to the conclusion this was a blatant violation of my Constitutional rights in the search of the car. Further I don't remember the case, but I think it was *Escobedo v. Ill.* the fruit of

the poisonous [sic] tree. The evidence from the car was used to produce witnesses and cross examine Pat.

The problem how [sic] can we make it timely again? I leave this to you.

I have nothing but time to research, so please don't feel the fact that I found this error reflects on you in any way, you did one hell of a job.

I am enclosing the transcript with this letter, and please let me know if we can still do anything if we are denied in the Appeal Court.

Respectfully and gratefully,

Harold Kaufman 88176
Box P.M.B.

P.S. Send the transcript back when you are done, no rush. Also, as you read the case and the transcript, the fact that we judicionaly [sic] admitted the crime does not in any respect give up any constitutional rights. Perhaps this might be grounds for reargument if I am denied the appeal. I leave the remedy to you all [sic] I ask is that you please realize I want to gamble on a new trial. I have nothing to lose and everything to gain.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. The trial	4
B. Direct review of the conviction	11
C. The Section 2255 proceeding	12
Introduction and summary of argument	16
Argument:	
I. Since the evidence seized from petitioner's auto- mobile plainly did not affect the verdict, the court below was not required to give plenary consideration to petitioner's claim, because even if he could establish that the search was illegal, he would not have been entitled to relief	20
II. Petitioner is not entitled to collateral review of his claim of illegal search and seizure	27
A. A claim of illegal search and seizure is not cognizable, in the absence of exceptional circumstances, on motion to vacate sen- tence	27
B. There are no exceptional circumstances which warrant consideration of petitioner's claim of illegal search and seizure on collateral attack	37
III. The testimony at trial plainly shows that the evidence was lawfully obtained	40
Conclusion	44

(1)

II

CITATIONS

Cases:

	Page
<i>Anderson v. Bannan</i> , 250 F. 2d 654.....	39
<i>Brown v. Allen</i> , 344 U.S. 443.....	29, 32
<i>Bumper v. North Carolina</i> , 391 U.S. 543.....	22
<i>Burdeau v. McDowell</i> , 256 U.S. 465.....	42
<i>Carafas v. LaVallee</i> , 391 U.S. 234.....	29
<i>Chapman v. California</i> , 386 U.S. 18.....	22, 24, 29
<i>Cooper v. California</i> , 386 U.S. 58.....	20, 43
<i>Coppedge v. United States</i> , 369 U.S. 438.....	20, 21, 27
<i>Elkins v. United States</i> , 364 U.S. 206.....	30
<i>Ellis v. United States</i> , 356 U.S. 674.....	20
<i>Fahy v. Connecticut</i> , 375 U.S. 85.....	22
<i>Fay v. Noia</i> , 372 U.S. 391.....	29, 32
<i>Gendron v. United States</i> , 295 F. 2d 897.....	35
<i>Gray v. United States</i> , 311 F. 2d 126, certiorari denied, 374 U.S. 838.....	36
<i>Harris v. United States</i> , 390 U.S. 234.....	26, 42
<i>Henry v. Mississippi</i> , 379 U.S. 443.....	29
<i>Hill v. United States</i> , 368 U.S. 424.....	29
<i>Indiviglio v. United States</i> , 352 F. 2d 276, certiorari denied, 383 U.S. 907.....	36
<i>Isaacs v. United States</i> , 283 F. 2d 587.....	35
<i>Jones v. United States</i> , 362 U.S. 257.....	35
<i>Katz v. United States</i> , 321 F. 2d 7, certiorari denied, 375 U.S. 903.....	35
<i>Kaufman v. United States</i> , 350 F. 2d 408, certiorari denied, 383 U.S. 951.....	3, 12, 23
<i>Ker v. California</i> , 374 U.S. 23.....	42
<i>King v. Wainwright</i> , 368 F. 2d 57.....	39
<i>Kuhl v. United States</i> , 370 F. 2d 20.....	35, 39
<i>Linkletter v. Walker</i> , 381 U.S. 618.....	30, 31
<i>Machibroda v. United States</i> , 368 U.S. 487.....	29
<i>Maneusi v. DeForte</i> , No. 844, O.T. 1967, decided June 17, 1968.....	28
<i>Mapp v. Ohio</i> , 367 U.S. 643.....	28, 30
<i>Miller v. Pate</i> , 386 U.S. 1.....	38
<i>Palakiko v. United States</i> , 209 F. 2d 75.....	40

III

Cases:—Continued

	Page
<i>Preston v. United States</i> , 376 U.S. 364.....	12, 40, 41, 42
<i>Rogers v. Richmond</i> , 365 U.S. 534.....	29
<i>Sanders v. United States</i> , 373 U.S. 1.....	29, 33
<i>Smith v. United States</i> , 335 F. 2d 270.....	36
<i>Sykes v. United States</i> , 373 F. 2d 607, certiorari denied, 386 U.S. 977.....	36
<i>Taylor v. United States</i> , 238 F. 2d 409, certiorari denied, 353 U.S. 938.....	39
<i>Terry v. Ohio</i> , 392 U.S. 1.....	31, 41
<i>Thomas v. United States</i> , 376 F. 2d 564.....	36
<i>Thornton v. United States</i> , 368 F. 2d 822.....	28, 31, 38
<i>Towsend v. Sain</i> , 372 U.S. 293.....	29
<i>United States v. Blythe</i> , 325 F. 2d 96.....	35
<i>United States v. Burrell</i> , 324 F. 2d 115, certiorari denied, 376 U.S. 937.....	35
<i>United States v. Follette</i> , 358 F. 2d 922.....	39
<i>United States v. Hayman</i> , 342 U.S. 205.....	29
<i>United States v. Nicholas</i> , 319 F. 2d 697, certiorari denied, 375 U.S. 933.....	35
<i>United States v. Paradise</i> , 334 F. 2d 748.....	35
<i>Warden v. Hayden</i> , 387 U.S. 294.....	28
<i>Weeks v. United States</i> , 232 U.S. 383.....	31, 34
<i>Wilkins v. United States</i> , 376 F. 2d 552, certiorari denied, 389 U.S. 964.....	36
<i>Zachary v. United States</i> , 275 F. 2d 793, certiorari denied, 364 U.S. 816.....	35
Constitution, statutes, and rule:	
United States Constitution, Fourth Amendment.....	2,
	26, 28, 30, 31, 32, 34, 42
18 U.S.C. 2113(a).....	3
18 U.S.C. 2113(d).....	3
28 U.S.C. 1915(a).....	4
28 U.S.C. 2255.....	2, 3, 13, 15, 17, 21, 22, 28, 29, 33
Rule 41(e), Federal Rules of Criminal Procedure.....	34
Miscellaneous:	
Amsterdam, <i>Search, Seizure, and Section 2255: A</i> <i>Comment</i> , 112 U. Pa. L. Rev. 378.....	28, 34

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the court of appeals (A. 28) is not reported. The opinion of the district court (A. 17-26) is reported at 268 F. Supp. 484. The opinion of the court of appeals on direct review of petitioner's conviction is reported at 350 F. 2d 408 (C.A. 8) and this Court's order denying a petition for certiorari to review that judgment is reported at 383 U.S. 951.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1967. A petition for rehearing was denied on August 4, 1967. The petition for a writ of certiorari was filed on November 6, 1967, and was granted on

April 1, 1968 (390 U.S. 1002). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly denied petitioner's application to proceed *in forma pauperis* on appeal from the denial of his motion to vacate sentence, under 28 U.S.C. 2255, challenging the admissibility at trial of evidence claimed to have been obtained in violation of the Fourth Amendment.

STATUTE INVOLVED

The pertinent provisions of 28 U.S.C. 2255 are:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the * * * sentence imposed was not authorized by law or otherwise

open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

STATEMENT.

In 1964 petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri of armed robbery of a federally insured savings and loan association, in violation of 18 U.S.C. 2113(a), (d), and was sentenced to twenty years' imprisonment. The conviction was affirmed on appeal, *Kaufman v. United States*, 350 F. 2d 408 (C.A. 8), and this Court denied a petition for a writ of certiorari, 383 U.S. 951.

On June 13, 1966, petitioner filed a motion to vacate sentence, under 28 U.S.C. 2255 (A. 3-11). The sentencing court appointed counsel to assist petitioner, and on September 9, 1966, counsel filed a supplemental motion under Section 2255, which alleged, *inter alia*, that certain items of physical evidence had been improperly admitted at trial because they had been obtained as a result of an illegal search of petitioner's automobile (A. 12-14). The court overruled the mo-

tion and supplemental motion to vacate sentence on March 16, 1967 (A. 17-26), and on March 27, the court denied petitioner's application to appeal *in forma pauperis*, and certified that the appeal was not taken in good faith (A. 27; see 28 U.S.C. 1915(a)). On May 11, 1967, the court of appeals denied petitioner's application for leave to proceed on appeal *in forma pauperis* (A. 28).

The circumstances in which the contested evidence was admitted at trial, and the disposition of petitioner's claim on direct and collateral review, are set forth below.

A. THE TRIAL

Petitioner was represented by an able and experienced appointed attorney, who subsequently was elected president of the St. Louis Bar Association (A. 18). In his opening statement to the jury at the outset of trial, and in his closing argument, counsel conceded that petitioner had committed the robbery, but contended that he was not legally responsible for the crime by reason of mental illness (A. 36-38, 127, 131, 134). With the approval of petitioner's counsel, the court instructed the jury that the only contested issue in the case was whether petitioner was legally sane at the time he committed the robbery (A. 145, Tr. 478).

1. At about 4 p.m. on December 16, 1963, petitioner entered the River Roads Branch of the Roosevelt Federal Savings and Loan Association in Jennings, Missouri, a suburb of St. Louis (A. 39). After being refused a request to purchase travelers' cheques with a personal check, petitioner engaged the branch

manager in a conversation about a G.I. loan, and expressed an interest in opening a savings account. While the manager was filling in an account application form, petitioner drew a pistol and ordered the manager to give him cash and all the travelers' cheques in the branch (A. 41-44). The manager gave petitioner about \$328 in cash, including 50 one-dollar bills whose serial numbers had been recorded, and two packets containing \$11,520 in American Express Travelers' Cheques (A. 44-47). Petitioner put the cash in the pockets of his overcoat and held the packets under his arm. He then ordered everyone in the office to go into a rear supply room, and left the building about 4:20 p.m. (Tr. 49-50). At trial, petitioner was identified as the robber by the branch manager, the assistant manager, and a customer who entered the office during the robbery (A. 39, 49-50).

2. The government introduced several items of evidence which were taken from petitioner's person during his detention in a local police station and from his automobile while it was being held on the premises of a private towing company. No motion to suppress this evidence was made before or during trial, but the circumstances in which the evidence was obtained were substantially developed in the testimony at trial.

Shortly after the robbery, at about 4:35 p.m., Officer Stahl of the Alton, Illinois, Police Department received a radio broadcast instructing him to intercept a 1963 red Rambler bearing New York License 8Z6367 which had been involved in a hit-and-run accident in Missouri (A. 53-54, 60). About five minutes

later, he observed the car proceed into Alton over the bridge from Missouri and followed it for a few blocks. When he motioned to the driver to pull over to the curb, the car attempted a sharp right turn, skidded on a patch of ice, and crashed into a tree on the left side of the street (A. 54, 61-63). Petitioner, the driver of the Rambler, got out of the car and, when asked about the accidents, he told Officer Stahl that he was drunk and gave his name as "Donald Taylor" (A. 54-55). Officer Stahl placed petitioner under arrest and called for a wrecker to tow the damaged car from the street. He then transported petitioner to the Alton Police Station, where they arrived at about 4:45 p.m. (A. 55-56).

F.B.I. Agent George Peet, who had been investigating the savings and loan robbery, went to the Alton Police Station upon being informed that the driver of the hit-and-run car had been arrested (A. 102-103). He arrived at the police station at about 5:45 p.m., while petitioner was being processed for detention (photographing, fingerprinting, etc.) by the Alton Police (A. 98). Thereafter, Agent Peet questioned petitioner to determine whether he had been involved in the robbery. Petitioner stated that he had driven from New York to St. Louis for the purpose of committing a robbery, and gave an account of the robbery similar to that of the branch manager (A. 95). He said that he saw a police car as he drove out of the savings and loan's parking area and, thinking the police were after him, he "panicked and drove

off very hurriedly" and hit another car while making his escape (A. 96).¹

When petitioner completed his statement at about 6:40 p.m., Agent Peet reported that information to his superior, Agent Morley, who told him that federal charges would be filed against petitioner. Agent Peet returned to petitioner and advised him that he would be prosecuted on a federal robbery charge. The witnesses to the robbery were then brought to the police station to identify petitioner (A. 103-104).

Agent Morley directed Agent Albert Rushing to go to the Alton Police Station to assist in the investigation (A. 85). When Agent Rushing arrived, Captain Peterson of the Alton Police Department turned over to him a rental contract for the Rambler automobile in the name of Arthur Cooper and \$352.03 in cash, including 70 one-dollar bills, which had been recovered from petitioner's person by the Alton Police at the station house (A. 80-81, 70-71, 67-68). Agent Rushing signed a receipt assuming custody of petitioner, and at about 8 p.m. petitioner was removed to the F.B.I. office in St. Louis (A. 87, 103).

Shortly after petitioner had been taken to the Alton Police Station, Clifford Martin, the operator of a private towing service, towed petitioner's disabled automobile to his garage (A. 64). While he was inspecting the car at the garage, he observed a revolver, in plain view, on the rear seat of the car (A. 65). He telephoned this information to the Alton Police Department, and Officer Stahl was sent out to the ga-

¹The substance of petitioner's statement was brought out on *voir dire* examination of Agent Peet after the jury had been excused (A. 94-105); it was not repeated in testimony before the jury.

rage. Martin then removed the revolver (which was fully loaded) and, at Stahl's instructions, placed it in a locked drawer in his office. (A. 59-60, 65). Martin gave the revolver to the F.B.I. agents, later that evening.

At about 7:30 p.m. that evening (December 16), Agent Morley instructed Agent John Newcomer to go to Cliff Martin's garage to search petitioner's automobile (A. 79). Agent Newcomer found two packets containing the stolen travelers' cheques on the floor board of the car (A. 73). He also discovered a traffic summons from New York City dated December 14, two gasoline sales receipts dated December 15 from Pennsylvania, and a receipt for a Western Union telegraph money order sent by "Paul King" from Harrisburg, Pennsylvania, on December 15 (A. 74-75). The search was conducted without a warrant.

The items recovered from petitioner's person at the Alton Police Station—the rental contract (Govt. Ex. 8, A. 67-68, 83) and the money (Govt. Ex. 13, A. 81, 83)—were admitted in evidence over petitioner's objection that they were illegally seized because petitioner was not in custody for a federal offense at the time they were obtained (A. 83, see A. 68). Agent Rushing testified that the serial numbers on 50 of the one-dollar bills recovered from petitioner's person were identical with the serial numbers of the bills which had been stolen from the savings and loan association (A. 82-83; Govt. Ex. 3, A. 46-48).

The revolver which had been found and removed from the automobile by Cliff Martin was admitted in evidence without objection (Govt. Ex. 6, Tr. 59-60).

The manager of the branch testified that the revolver was similar to the one petitioner carried during the robbery (A. 43). The manager of a gun shop in Alton testified, without objection, that petitioner had purchased the revolver from his store on the day of the robbery (A. 51-52).

The two packets of travelers' cheques recovered in the F.B.I.'s search of the car were admitted in evidence without objection (Govt. Exhs. 5-A and 5-B, A. 48). The branch manager identified them as the packets which he gave to petitioner (A. 46), and Agent Newcomer testified that the serial numbers on the travelers' cheques were identical with the serial numbers on the savings and loan association's inventory list (A. 74-75; Govt. Ex. 4, A. 45-46, 48).

The other items recovered in the search of the car—the traffic summons, two gasoline receipts, and the Western Union receipt—were admitted in evidence over petitioner's objection that they were not relevant and that they had been illegally seized because petitioner was in the custody of local authorities and was not under arrest on federal charges at the time the car was searched (Govt. Exhs. 9-12, A. 75-78). Petitioner's girl friend, Mrs. Patricia Scott, testified on cross-examination that the Western Union receipt (Govt. Ex. 11) evidenced a \$50 money order which petitioner, using the name "Paul King," had sent to her (A. 89-90). The traffic summons and the gasoline receipts were not referred to in the testimony other than at the time of their admission.

3. The theory of the defense was that petitioner was unable to control his actions on the day of the rob-

bery because of a mental disorder, which was diagnosed as "schizophrenic reaction, paranoid" type, in partial, rather stable remission" by the psychiatric staff of the Federal Medical Center (Springfield, Missouri) in February 1964, about two months after the robbery (Tr. 223, 225). Dr. Glotfelty, who had examined petitioner at Springfield, was called as a defense witness, but was unable to give an opinion whether petitioner had been able to control his actions on the day of the robbery (Tr. 223, 235, 247). He testified that at some time prior to the examination, petitioner's condition might have been more severe, so that he would have had difficulty controlling his actions, but that this could be more accurately determined by persons who had observed petitioner in November or December (Tr. 231-234, 253-254).

Dr. Waitzel, also called as a defense witness, had last examined petitioner in December 1960, and had not found him to be psychotic at that time (Tr. 263, 270). He substantially concurred in the medical center's diagnosis (Tr. 280). But he stated that in his opinion, based significantly on the testimony at trial, petitioner could have been unable to control his impulse to commit crime in December 1963 (Tr. 292-294). In explaining the nature of schizophrenia to the jury, Dr. Waitzel testified that the disease did not necessarily impair the individual's capacity for planning his activities or for responding intellectually to everyday problems (Tr. 282-284, 296, 326).

Mrs. Patricia Scott, with whom petitioner associated almost constantly from August to December 1963, testified to petitioner's nervousness and eccen-

tric behavior, his fears for his safety resulting from his indebtedness to an underworld figure, and his desire to be recognized as a successful robber (Tr. 131, 148-152, 156-157, 160-161, 176). Mrs. Scott testified that, in her opinion, petitioner was not sane (Tr. 171). Detective Kiernan of the New York City Police Department testified concerning petitioner's activities as an informer (Tr. 202-204). He stated that petitioner appeared to be nervous, but that he did not believe petitioner was insane (Tr. 207-209).

In rebuttal, the government called Dr. Weiland, who also examined petitioner at Springfield. He testified that there was no medical evidence indicating that petitioner had been unable to control his behavior at the time of the robbery. (Tr. 338). Dr. Davidson, an internist who examined petitioner on the evening of December 16, testified that petitioner did not display any anxiety or any gross manifestation of psychosis or neurosis (Tr. 365, 367). Two F.B.I. agents who questioned petitioner after his arrest testified that he did not seem unusually nervous and that his answers were responsive and logical (A. 107-109, 119-121).

B. DIRECT REVIEW OF THE CONVICTION

Petitioner filed a notice of appeal and new counsel was appointed. On appeal, counsel briefed and argued several points relating to the insanity defense and two other claims of alleged interference with petitioner's right to counsel. No contention was advanced that the search of petitioner's car was illegal (See Pet. Ex. D). Petitioner's appeal was argued on March 9, 1965. Thereafter, on April 26, 1965, petitioner wrote a letter

to appellate counsel, stating that he had "discovered" that the search of his car was illegal under *Preston v. United States*, 376 U.S. 364, and urging counsel to present that issue to the court (Br. App. D, pp. 62-63; see n. 16, *infra*). Counsel forwarded this letter to the Clerk of the Eighth Circuit Court of Appeals (Br. App. D, p. 61), and on June 18, 1965, the Clerk notified counsel that the letter had been given to the panel which was considering the appeal (Pet. Ex. G). The court affirmed the conviction on September 8, 1965, without direct reference to the search and seizure claim. 350 F. 2d 408. A petition for a rehearing was denied.

In his *pro se* petition for a writ of certiorari (No. 1025 Misc., O.T. 1965), petitioner contended that the search and seizure of items from his car was illegal. He also claimed that he was under the influence of drugs at the time of trial and that the government had knowingly suppressed a witness material to his defense. In its brief in opposition, the government argued that the facts of record showed the search to have been proper and that, in any event, the introduction of these items would not warrant reversal because petitioner did not dispute the commission of the offense. The petition was denied. 383 U.S. 951.

C. THE SECTION 2255 PROCEEDING

The only claim presented in petitioner's original motion to vacate sentence was that he was unable to consult with or effectively assist counsel because the drug lithium (a tranquilizer) had been administered to him before and during trial (A. 3-11). District Judge John

K. Regan, who had presided at petitioner's trial, ordered a hearing on the motion and appointed counsel to assist petitioner. On September 9, 1966, counsel filed a supplemental motion under Section 2255, realleging the claim asserted in petitioner's motion and presenting two additional claims which had been raised in the petition for a writ of certiorari—that the government had withheld information concerning the whereabouts of a defense witness and that the search of petitioner's automobile was illegal because it was conducted without a warrant (A. 12-14).

After an evidentiary hearing, which apparently focused primarily, if not exclusively, on the competency and suppression questions, Judge Regan found those contentions to be without merit (A. 17-26, 268 F. Supp. 484). With respect to the search and seizure claim, the court stated (A. 21, 268 F. Supp. at 487):

The supplemental motion to vacate, prepared by appointed counsel, asserts as a further ground for relief that certain physical evidence was obtained by an allegedly unlawful search and seizure of Kaufman's automobile after his arrest. The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion. * * *

On March 22, 1967, petitioner, apparently with the assistance of counsel who represented him on the motion, filed an application for leave to appeal in

forma pauperis (R. 83). The affidavit in support of the application merely recited, in summary form, all of the grounds alleged in the supplemental motion to vacate (R. 84-85). On March 27, the district court certified that the appeal was not taken in good faith because petitioner's affidavit did not "state the nature of the appeal nor his belief that he is entitled to redress. * * * In our judgment the appeal in this case is frivolous and wholly without merit" (A. 27).

On May 11, 1968, the court of appeals entered the following order denying petitioner's motion for leave to proceed *in forma pauperis* filed in that court (A. 28):

The Court has considered a motion for leave to proceed on appeal in *forma pauperis*, and in connection with that motion has examined the original files of the United States District Court for the Eastern District of Missouri.

Being fully advised in the premises, it is now here ordered that the motion for leave to proceed on appeal in *forma pauperis* be, and it is hereby, denied.

In his petition for a writ of certiorari in this Court (No. 890 Misc., O.T. 1967), prepared with the assistance of present counsel, petitioner presented two questions: whether the court of appeals improperly refused to consider his search and seizure claim on direct appeal, and whether, in view of the disposition of his search and seizure claim on direct appeal and on collateral attack in the district court, he was improperly denied appellate review of that claim by the court of appeals' refusal to allow him to proceed *in forma pauperis*. Petitioner's argument rested

heavily on the assumption that the court of appeals did not consider the claim on direct review, and on the assertion that he had urged appellate counsel to brief and argue that issue (Pet. 3). Petitioner did not state, however, that he had conceded the commission of the robbery at trial and had relied solely on a defense of insanity.

In its memorandum in opposition, the government interpreted the gravamen of the petition as a challenge to the district court's statement that petitioner could not raise the search and seizure claim collaterally because he had not assigned it as error on direct appeal. The government took the position, in accord with a substantial body of court of appeals decisions, that petitioner's failure to move to suppress the evidence at trial precluded him from raising the issue on appeal, and therefore, it was not available on collateral attack. We also noted that petitioner had conceded the commission of the robbery at trial.²

In his brief in this Court, petitioner seeks to present three questions: whether a conviction based upon illegally seized evidence is subject to collateral attack under Section 2255; whether the failure of the court of appeals to consider his search and seizure claim on direct review entitles him to a disposition on the merits of that claim in a Section 2255 proceeding;

² In a reply brief to the government's memorandum in opposition, petitioner asserted (p. 2) that the prosecutor, in response to counsel's objection to the admission of the evidence recovered from the automobile, had stated that "all the papers in the car are essential to our prosecuting on the insanity issue." No such statement appears at that point (A. 76-78), or at any other point, in the record.

and whether the searches of his automobile and of his person were lawful.

INTRODUCTION AND SUMMARY OF ARGUMENT

We have recited the facts in considerable detail because the issues presented to this Court appear to have become somewhat diffused. What this case involves, in our view, is a challenge to the admission of three items of evidence—a traffic summons, gasoline receipts, and a money order receipt—raised collaterally after a trial in which petitioner conceded the commission of an armed robbery and defended solely on the ground of insanity. Although the stolen travelers' cheques and a revolver were also recovered from petitioner's automobile, their admission in evidence presents no serious question. The case does not involve the validity of the search of petitioner's person, because the admission of the evidence obtained in that search was not challenged in petitioner's motion to vacate sentence. Finally it does not involve the admission of other evidence which petitioner challenges for the first time in this Court by asserting facts outside the record.

The procedural posture of the case initially presents the narrow issue whether the court below properly denied leave to proceed *in forma pauperis*. Although it does not seem likely that the petition was granted solely to consider that issue, we believe that it presents a basis on which the decision below may be affirmed, because even if the evidence was erroneously admitted, it was a plainly harmless error which would not justify plenary consideration on appeal.

The more significant issue, however, which the Court may find it necessary to reach, is whether petitioner's claim of illegal search and seizure is cognizable by motion under Section 2255. In view of the position we take on this issue, we believe that the present record is adequate to decide the question without further proceedings in the courts below. We argue that, in the circumstances of this case, petitioner's failure properly to present his search and seizure claim at trial and on direct review should bar him from raising that claim collaterally.

In the event the Court should hold that petitioner is entitled to collateral review of the challenged search and seizure, we think that this record is adequate to allow disposition of that claim on its merits at this stage. The testimony at trial establishes that the search of the automobile was entirely lawful.

I.

A court of appeals may properly deny leave to proceed *in forma pauperis* if the issues sought to be raised are patently frivolous. The decision below may be sustained on the ground that petitioner's claim of illegal search and seizure presents a plainly harmless error which would not justify setting aside his conviction. The evidence which petitioner challenges—a traffic summons, gasoline receipts, and a money order receipt—clearly did not have any probative value, by themselves, on the question of petitioner's sanity. Although the prosecutor briefly referred to the evidence at the outset of his closing argument, the substance of his statement was merely that petitioner had

driven from New York to St. Louis to commit the robbery. That statement could have been made on the basis of other evidence in the case. In view of the nature of the psychiatric testimony and the other evidence of petitioner's behavior on the day of the robbery, which was more fully discussed in the closing argument, the seized evidence plainly did not affect the jury's verdict.

II

Regardless of the extent to which a State prisoner may obtain relief on federal habeas corpus on the basis of a claim of illegal search and seizure, there are sound reasons why the federal courts should decline to exercise jurisdiction to grant collateral relief to a federal prisoner who has failed properly to present his search and seizure claim at trial and on appeal. The federal defendant, unlike the State defendant, may try his claim to a federal judge, preferably in advance of trial, and obtain appellate review within the federal system. The requirement of early litigation of search and seizure claims is designed to ensure more accurate findings of fact, to protect the defendant by aborting prosecutions which cannot be maintained without the suppressed evidence, and to save the government from avoidable error by resolving questions as to the admissibility of seized evidence which, as in this case, is wholly immaterial to obtaining a conviction. Furthermore, the deterrent principle on which the exclusionary rule rests is severely attenuated when the rule is invoked on collateral attack, often many years after the search. In the absence of circumstances showing that he was impeded in the

presentation of his search and seizure claim, there is no reason why a federal defendant who did not exercise his right to have that claim authoritatively disposed of, after full litigation, in the conviction proceedings should be permitted to present that claim to the same courts in a collateral proceeding.

There are no exceptional circumstances in this case which would entitle petitioner to collateral relief on the basis of his search and seizure claim. Petitioner fully agreed with his able trial counsel to concede the commission of the offense and to rest solely on an insanity defense. The seized evidence challenged here was plainly immaterial to that defense, and counsel had no cause to contest its admission by requiring a hearing on a motion to suppress. Appellate counsel also considered the claim and found it to be of little merit, but he did bring the issue to the attention of the court, after argument, at petitioner's insistence.

III

The testimony at trial is adequate to refute petitioner's contention that the evidence was illegally seized. The revolver was observed in plain view on the back seat of the automobile by a private individual who had been called to tow the disabled vehicle off the street. It was obtained without a search and without the intervention of any law enforcement agency. At the time the F.B.I. agent searched the automobile, it was known that it had been used as an instrumentality in the commission of a federal offense and that it did not belong to petitioner but had been rented by someone else. The automobile, therefore,

was properly taken into custody; it was to be retained by federal authorities until trial and then returned to its owner. The reason petitioner was taken into custody by the F.B.I., the reason the car was seized, and the reason it was searched, were all the same. In almost identical circumstances this Court upheld a warrantless search in *Cooper v. California*, 386 U.S. 58.

ARGUMENT

I. SINCE THE EVIDENCE SEIZED FROM PETITIONER'S AUTOMOBILE PLAINLY DID NOT AFFECT THE VERDICT, THE COURT BELOW WAS NOT REQUIRED TO GIVE PLENARY CONSIDERATION TO PETITIONER'S CLAIM, BECAUSE EVEN IF HE COULD ESTABLISH THAT THE SEARCH WAS ILLEGAL, HE WOULD NOT HAVE BEEN ENTITLED TO RELIEF.

In view of the procedural posture of this case, the narrow, and perhaps dispositive, issue presented here is whether the court below properly denied petitioner's application for leave to proceed *in forma pauperis*. The Court held in *Coppedge v. United States*, 369 U.S. 438, that such an application must be granted unless it appears that the issues raised are so lacking in merit that the appeal would be dismissed, if filed by a nonindigent appellant, without plenary consideration. See also, *Ellis v. United States*, 356 U.S. 674. As noted above (p. 14, *supra*), the court of appeals did not articulate the grounds for its denial of petitioner's application, although it did state that it had reviewed the files and proceedings with respect to petitioner's conviction. We think that the most obvious, and most likely, basis for the court's decision was that in the circumstances of this case, it plainly appeared that the evidence seized from petitioner's

automobile was so insignificant to the jury's finding, that any error in the admission of that evidence was harmless error, which did not entitle petitioner to relief.

We believe that the decision below may be sustained on that ground, without determining whether petitioner was entitled to raise his claim of illegal search and seizure by a Section 2255 motion or whether the evidence in fact had been illegally seized. Although the policies announced in *Coppedge* may, to some extent, limit the application of the harmless error rule as a ground for denial of leave to proceed *in forma pauperis* on direct appeal from a conviction, different considerations are presented when leave is sought to appeal from a denial of Section 2255 relief. In the present case, the court of appeals had previously reviewed petitioner's trial on direct appeal, being apprised of the belated claim of illegal search and seizure, and this Court had denied a petition for a writ of certiorari which raised the search and seizure issue. Petitioner's claim was then heard and rejected on collateral attack by the district judge who presided at his trial. In these circumstances, no useful purpose is served by requiring a court of appeals which is familiar with the facts of the case and with the significance of the challenged evidence at trial to allow petitioner to brief and argue a claim which, even if established, would not justify his release.

Our position is premised, of course, on the assumption that the harmless error rule applies equally to claims raised collaterally as well as to those presented on direct appeal. That is, if the admission of

illegally seized evidence could properly be found to be harmless error by a court of appeals, a convicted defendant who established that claim in a Section 2255 proceeding would not be entitled to release. Whatever standards may govern the scope of collateral proceedings to litigate claims which were, or could have been, presented at trial and appeal (see Part II, *infra*), it would obviously make a mockery of the appellate process to require the courts, on collateral attack, to set aside final convictions on the basis of insignificant errors which would not justify reversal on direct appeal. In *Bumper v. North Carolina*, 391 U.S. 543, 556, the Court indicated (although it does not appear to have been theretofore seriously doubted)³ that the harmless error rule is applicable on direct review of search and seizure claims. At a time when the federal courts are dealing with an increasing volume of collateral attacks on State convictions, they should not be required to give plenary consideration on Section 2255 motions to search and seizure claims in respect of evidence which plainly had no effect on the conviction.

Assuming *arguendo* that the search of petitioner's automobile was invalid (but see pp. 42-43, *infra*), the admission into evidence of the items seized—a traffic summons, two gasoline receipts, and a Western Union receipt⁴—presents the clearest instance of harmless

³ Compare *Fahy v. Connecticut*, 375 U.S. 85; *Chapman v. California*, 386 U.S. 18, 44 n. 2 (Stewart, J., concurring).

⁴ The irrelevance of the revolver and the stolen travelers' cheques to petitioner's insanity defense is too plain to require argument. Furthermore, the seizure of the revolver was clearly lawful, see pp. 41-42, *infra*.

error. Petitioner cannot contend that he was prejudiced by the jury's consideration of that evidence on the question whether he committed the robbery. Not only did he concede that fact throughout the trial, but he was positively identified by three eye-witnesses to the robbery. Nearly three-quarters of the record is comprised of expert and lay testimony on the only issue which petitioner contested—his sanity at the time of the offense. The evidence presented in petitioner's behalf, summarized above and in the court's opinion on direct appeal (pp. 9-11, *supra*; 350 F. 2d at 410-412), was far from compelling on the issue of petitioner's sanity. And as defense counsel argued, there was no testimony which would suggest that petitioner's ability to plan his activities and to attend to routine matters would be inconsistent with an inability to refrain from unlawful conduct (A. 129; see p. 10, *supra*).

It cannot be argued that a traffic summons, a Western Union receipt, and two gasoline receipts had any probative value, by themselves, on the question of petitioner's sanity at the time of the robbery. In an attempt to show that the evidence influenced the jury's verdict, petitioner relies, apparently for the first time in his brief in this Court (Br. 11, 42), on a portion of the prosecutor's initial closing argument in which those items were mentioned. This contention magnifies a single paragraph out of all proportion to its significance in the context of the argument itself and of the trial as a whole. The substance of the paragraph which petitioner cites was that petitioner drove the automobile from New York to St. Louis and stopped along the way to purchase gasoline and to telegraph

money to his girlfriend in New York. In the course of that statement, the prosecutor alluded to the rental contract, which was not raised in the motion to vacate sentence since it was recovered from petitioner's person, and to the traffic summons and the receipts.

The paragraph relied on by petitioner was only the introduction to a much longer and more detailed discussion of petitioner's conduct in St. Louis and Alton on the day of the robbery (A. 123-126). In view of the nature of the psychiatric testimony on the question of petitioner's sanity, as well as the other testimony with respect to petitioner's behavior on the day of the robbery, it stretches the imagination too far to suppose that the jury's finding of sanity was measurably affected by the evidence that petitioner drove to St. Louis, purchased gasoline, and sent a telegram. See *Chapman v. California*, 386 U.S. 18, 24. Furthermore, even if the challenged evidence had been excluded, the introduction to the prosecutor's argument would not have been materially different. The fact that petitioner was driving a car with New York license plates on the day of the robbery, that he was in possession of a rental contract for the car issued in New York, and the testimony of Pat Scott that he left New York with the expressed purpose of committing a robbery,⁵ provided a basis on which the prosecutor could have made a proper argument that petitioner had driven from New York to St. Louis. Evidence that peti-

⁵ At one point Mrs. Scott testified that "I think [petitioner] said he was going to fly" (Tr. 135). To the extent that statement was inconsistent with petitioner's activities, the jury may have disregarded it, as petitioner himself has elected to do in this Court, see Br. 44-45 & n. 7.

tioner purchased gasoline for his car and telegraphed \$50 to Mrs. Scott added nothing of significance.*

Petitioner also argues—for the first time in this Court, and without any support in the record—that the search of the car also disclosed a receipt for the purchase of the revolver and that the receipt, or the serial number on the revolver itself, led the agents to the manager of the gun shop, whose testimony, petitioner contends, should have been excluded as the “fruit” of an illegal search (Br. 7-8, 41-42). That argument proceeds from an erroneous premise, and in no event does it require reversal of the decision below.

Since petitioner's counsel saw fit to raise a new contention in this Court based on a factual assertion in a recent letter from his client (Br. 7-8 nn. 1, 2), it is appropriate to refute that contention by the use of facts not of record. A receipt for the purchase of the revolver was recovered, but it was found on petitioner's *person* by the Alton Police, not in his car, and is listed in the inventory of items which the Alton Police turned over to the F.B.I.* Since petitioner's motion to vacate did not challenge the legality of the search of his person, his present contention is not properly before this Court. In addition,

* Mrs. Scott testified that petitioner had previously wired money to her when he was away from New York City (Tr. 145).

* The report showing the receipt for the purchase of the revolver listed among the personal effects taken from petitioner by the Alton Police was turned over to defense counsel for his inspection during trial (A. 84-85).

as we show below (see p. 41, *infra*), the search of his person was plainly lawful.

Second, as petitioner acknowledges (Br. 8-9 n. 2), the identity of the gun-shop manager could have been obtained by tracing the serial number on the revolver. The revolver was not obtained as the result of a search by any police officer, but was seen by a private citizen in plain view on the back seat of the automobile, and was removed and kept by him until it was turned over to the F.B.I. Those facts present no question of illegality under the Fourth Amendment. See *Harris v. United States*, 390 U.S. 234; pp. 41-42, *inf.*

Finally, even under the improbable assumption that the shop manager's testimony was derived from illegally obtained evidence, the admission of that testimony was at most an obviously harmless error which, for the reasons stated above, did not entitle him to relief. Insofar as the shop manager's testimony was relevant to petitioner's insanity defense, he stated that petitioner "talked very normal" and "appeared to me not to be nervous" at the time he purchased the revolver (A. 52). And in the portion of the prosecutor's closing argument cited by petitioner (Br. 12), the prosecutor referred to the purchase of the gun and stated that petitioner "displayed no nervousness" and that his conversations "appeared to the salesman to be perfectly normal" (A. 124).

That evidence has none of the significance which petitioner attempts to attach to it. The shop manager's testimony was consistent and cumulative with the testimony of seven other witnesses who stated that

petitioner did not exhibit any unusual nervousness and was coherent and rational on the day of the robbery: the branch manager of the savings and loan association (Tr. 30), the assistant manager (Tr. 48), a customer who entered the branch office during the robbery (Tr. 53), a doctor who examined petitioner after he was removed to the St. Louis F.B.I. office (Tr. 365), Agent Peet, who questioned petitioner at the Alton Police Station (A. 107-109), and Agent Walls and Chief Obertz, who were present during the questioning (A. 119-121; Tr. 429-431). In his closing argument the prosecutor referred to all of that testimony in tracing petitioner's activities throughout the day of the robbery, and emphasized the fact that there was no evidence that petitioner displayed any unusual nervousness during the robbery, at the time of his arrest, or during the time he was being questioned (A. 124-126). Indeed, defense counsel argued that petitioner's calmness on the day of the robbery was evidence of his abnormal mental condition (A. 131-132).

II. PETITIONER IS NOT ENTITLED TO COLLATERAL REVIEW OF HIS CLAIM OF ILLEGAL SEARCH AND SEIZURE

A. A CLAIM OF ILLEGAL SEARCH AND SEIZURE IS NOT COGNIZABLE, IN THE ABSENCE OF EXCEPTIONAL CIRCUMSTANCES, ON MOTION TO VACATE SENTENCE

If the Court does not accept the foregoing argument, *Coppedge v. United States, supra*, would suggest that the judgment should be reversed and the cause remanded with instructions to the court of appeals to entertain petitioner's appeal *in forma pauperis*. In that event, a principal issue on appeal would be

whether petitioner's search and seizure claim is cognizable on a motion to vacate sentence. Since that is the issue on which the petition and the government's opposition seem to have focused, we assume that the Court would wish to consider, and perhaps to decide, the merits of the question. For reasons which follow, we believe that petitioner may not maintain his search and seizure claim collaterally and that the judgment below should be affirmed on that ground, without remand to the court of appeals. We agree with the position taken by the Court of Appeals for the District of Columbia Circuit in *Thornton v. United States*, 368 F. 2d 822, that absent exceptional circumstances (see pp. 37-39, *infra*), not present in this case, a federal prisoner is not entitled to have his sentence set aside, under Section 2255, on the basis of a search and seizure claim which he failed properly to present at trial and on appeal. See Amsterdam, *Search, Seizure, and Section 2255—A Comment*, 112 U. Pa. L. Rev. 378.

Prior to this Court's decision in *Mapp v. Ohio*, 367 U.S. 643, the exclusionary rule with respect to evidence seized in violation of the Fourth Amendment was not deemed to be of constitutional dimension. Accordingly, a claim that such evidence had been admitted at trial was not cognizable on collateral attack in the federal courts. As this Court implicitly held last Term, however, the announcement of a constitutional predicate for the exclusionary rule opens the issue of illegal search and seizure to review on federal habeas corpus by State prisoners. *Mancusi v. DeForte*, No. 844, O.T. 1967 (decided June 17, 1968); *Carafas v. LaVallee*, 391 U.S. 234; see *Warden v. Hayden*, 387

U.S. 294; *Henry v. Mississippi*, 379 U.S. 443, 452. Reasoning from this Court's holdings that the scope of relief under Section 2255 is intended to be coextensive with the remedy available by writ of habeas corpus,⁸ petitioner concludes (Br. 18) that federal prisoners must likewise be afforded collateral review, under Section 2255, of search and seizure claims.

1. Petitioner's argument, in our view, does not adequately present the competing policies which shape this issue. Because search and seizure claims have only recently come within the standards of habeas corpus jurisdiction, the particular considerations which such claims present have not been before the Court in cases in which the reach of the habeas corpus remedy has been in issue. In large part, the present scope of federal collateral relief has been forged in cases presenting claims of coerced confession⁹—a claim which, if proved, establishes that the petitioner has been convicted through the use of evidence which is inherently prejudicial¹⁰ and which impugns the integrity of the fact-finding process. The claim of illegal search and seizure, however, possesses neither of those attributes. The exclusionary rule which it invokes is not designed to punish the offending of-

⁸ *Sanders v. United States*, 373 U.S. 1, 13-14; *Hill v. United States*, 368 U.S. 424, 427; *United States v. Hayman*, 342 U.S. 205, 210-219.

⁹ *E.g.*, *Fay v. Noia*, 372 U.S. 391; *Townsend v. Sain*, 372 U.S. 293; *Rogers v. Richmond*, 365 U.S. 534; *Brown v. Allen*, 334 U.S. 443. Compare *Machibroda v. United States*, 368 U.S. 487 (involuntary guilty plea); *Sanders v. United States*, *supra* (incompetency).

¹⁰ *Chapman v. California*, *supra*, 386 U.S. at 42-43 (Stewart, J., concurring).

ficer, or to redress the victim, or to prevent his conviction on the basis of unreliable evidence: it is a prophylactic device intended generally to deter Fourth Amendment violations.¹¹ As the Court recognized in *Linkletter v. Walker*, 381 U.S. 618, 639, in which the extension of the exclusionary rule to State trials was denied retroactive application, the claim of illegal search and seizure, raised collaterally, challenges the admission of evidence "the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome."

The collateral availability of search and seizure claims, therefore, presents new and difficult questions. Before such claims are afforded the scope of collateral reviewability designed to correct the admission of unconstitutionally obtained evidence which is always prejudicial, it must be asked whether it would not be more appropriate to formulate a rule which is more sensitive to the varying degrees of importance which physical evidence may have at trial. The manifest importance, or insignificance, of the challenged evidence in the context of the trial should be a highly relevant consideration in determining whether the interests of justice would be served by entertaining collaterally a search and seizure claim which was not properly presented in the original proceedings.

Before search and seizure claims are afforded the scope of collateral reviewability designed to correct the admission of unreliable evidence, or to enlarge

¹¹ See e.g., *Elkins v. United States*, 364 U.S. 206, 217; *Linkletter v. Walker*, 381 U.S. 618, 636; *Mapp v. Ohio*, 367 U.S. 643, 657-658.

the victims of proceedings which are shocking to our sense of justice, it must be asked whether the social cost of that result is a necessary price to pay for the enforcement of the exclusionary rule. In order to deter official lawlessness, the exclusionary rule sets free persons who have been, or could have been, properly convicted on the basis of reliable evidence. Granted that the delicate balance which underlay that rule was long ago resolved,¹² the effectiveness of the deterrent power of the rule remains the guiding consideration in determining the circumstances in which the rule may be enforced. *Linkletter v. Walker*, *supra*. The inherent limitations of the exclusionary rule as a deterrent have been recognized. *Terry v. Ohio*, 392 U.S. 1, 13-15 & n. 9. The rule works capriciously, but we must assume that it works most successfully, if it works at all, when its consequences are most visible to the offending officer and his colleagues—that is, when it is enforced at or before trial, while the circumstances of ^{the} search are easily recalled and the success of the prosecution is a matter of importance to the police. We do not know precisely to what extent, if any, the officer's motivation to respect Fourth Amendment rights is diminished by a defendant's failure to raise a search and seizure claim at trial; nor do we know to what extent, if any, his conduct would be affected by the release of the defendant in a collateral proceeding years removed from the search. But in either case, the likely affect would appear to be slight. See *Thornton v. United States*, *supra*, 368 F. 2d at 828. In view of the manifest opportunities for a federal defendant

¹² In *Weeks v. United States*, 232 U.S. 383.

to enforce the exclusionary rule before or at trial (see pp. 34-35, *infra*), and thus satisfy the public's interest in maintaining its deterrent effect, a relatively remote possibility of deterrence would not seem to justify the collateral release, except in special circumstances, of unquestionably guilty persons who elected not to raise the issue at trial.

2. Petitioner's argument also rests on the doubtful premise that the circumstances in which the federal courts may properly decline to exercise jurisdiction to grant relief on a search and seizure claim—a discretion which this Court recognized in *Fay v. Noia*, 372 U.S. 391, 438-439, in the context of a coerced confession claim by a State prisoner—are identical for both State and federal prisoners. For well recognized reasons, federal habeas corpus has become the “preferred” vehicle for assuring that federal constitutional rights are vindicated in State criminal proceedings. The inadequacy of State procedures to raise and preserve federal claims, the concern that State judges may be unsympathetic to federally created rights, and the institutional constraints on the exercise of the Supreme Court's certiorari jurisdiction to review State convictions, support the rule that a State prisoner may litigate, or relitigate, the facts underlying his federal constitutional claim before a federal judge. See *Brown v. Allen*, 344 U.S. 443. In recognition of the fact that a federal defendant may, in extraordinary circumstances, be impeded in presenting his search and seizure claim, a collateral forum for the enforcement of Fourth Amendment rights should never be foreclosed. But absent such circumstances,

there appears to be no compelling reason why the federal courts should exercise their jurisdiction under Section 2255 to entertain search and seizure claims.

The federal defendant, unlike his State counterpart, is entitled, indeed required, to litigate his search and seizure claim in a special proceeding before a federal judge in advance of trial; he may raise and try the claim during trial to a federal judge; he has the right to appeal an adverse ruling to a federal court of appeals; and if theretofore unsuccessful, he may petition for a writ of certiorari on a record made entirely in federal proceedings. In the case of a defendant whose search and seizure claim was fully presented and fairly heard, and rejected, at each of the foregoing steps, no purpose would be served by allowing him to repeat that process through the collateral route, beginning often with the same district judge who presided at his trial. Absent a showing that the presentation of his claim was impeded, the foreclosing of collateral relief for that defendant risks the denial of federal rights to no greater extent than the holding in *Sanders v. United States*, 373 U.S. 1, that a district court need not entertain a repeater motion raising a claim which had previously been decided on its merits against the petitioner in a prior Section 2255 proceeding.

To be sure, that is not this case. Petitioner presumably would argue that the failure to move to suppress the evidence, the failure to object to the admission of the evidence on the grounds that it was obtained by a warrantless search, and the failure to brief and argue the search and seizure claim on appeal,

would not preclude a State prisoner from maintaining that claim on federal habeas corpus. Because of the continued access to a federal forum enjoyed by the federal defendant, however, the result in a comparable case involving a State prisoner would not be controlling here. As Professor Amsterdam stated (112 U. Pa. L. Rev. at 381):

Granted * * * [that a State defendant, under *Fay v. Noia*, *supra*] does not lose the federal habeas corpus hearing, to which *Brown v. Allen* entitles him from the beginning, merely because he fails to press his federal claim before a state tribunal which in no case could dispose of it definitively against him. It does not follow that the federal accused who fails to present a timely and effective constitutional contention to a potentially dispositive federal forum thereby gains a second litigating opportunity which would not otherwise have been open to him.

3. A rule excluding evidence obtained in violation of the Fourth Amendment has been in effect in the federal courts since *Weeks v. United States*, 232 U.S. 383, decided in 1914. A motion to suppress such evidence has been available under Rule 41(e) of the Rules of Criminal Procedure since they were first adopted in 1946, and was established by judicial decision before that time. The rule provides:

* * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

In most instances, at least the minimal circumstances surrounding any search and seizure are known by defense counsel before trial, or at the very latest, when the evidence is offered at trial. It is desirable that the issues be litigated promptly, while memories are still fresh. Moreover, the facts which relate to the validity of a search and seizure, are often not germane to the trial at all, and even when germane, there is no necessity to develop all the details which would be relevant on the search and seizure question. As this Court said in *Jones v. United States*, 362 U.S. 257, 264:

This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystalization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt.

Accordingly, a search and seizure claim which was not preserved by motion to suppress generally may not be raised on appeal, absent a clear showing of excusable neglect.¹³ Where the facts showing an invalid

¹³ See e.g., *Katz v. United States*, 321 F. 2d 7, 9 (C.A. 1), certiorari denied, 375 U.S. 903; *United States v. Nicholas*, 319 F. 2d 697, 698 (C.A. 2), certiorari denied, 375 U.S. 933; *United States v. Paradise*, 334 F. 2d 748 (C.A. 3); *United States v. Blythe*, 325 F. 2d 96 (C.A. 4); *Zachary v. United States*, 275 F. 2d 793, 795-796 (C.A. 6), certiorari denied, 364 U.S. 816; *United States v. Burrell*, 324 F. 2d 115, 119 (C.A. 7), certiorari denied, 376 U.S. 937; *Gendron v. United States*, 295 F. 2d 897, 902 (C.A. 8); *Kuhl v. United States*, 370 F. 2d 20, 21 (C.A. 9) (en banc); *Isaacs v. United States*, 283 F. 2d 587, 589-590 (C.A. 10).

search and seizure appear of record, the court may consider the issue under the plain error doctrine.¹⁴ But even where the facts do appear on the record, courts have not necessarily deemed the issue subject to the plain error rule. For example, in a recent, hotly contested prosecution, some items of evidence, seized pursuant to a warrant from the home of one of the defendants, were introduced in evidence without objection. On appeal, the court declined to consider the issue because of the absence of objection (*Wilkins v. United States*, 376 F. 2d 552, 563 (C.A. 5), certiorari denied, 389 U.S. 964), although on the same day the court reversed the conviction, for another offense, of the defendant from whom such items had been taken, on the ground that the search warrant, which had been challenged in that separate prosecution, was invalid. *Thomas v. United States*, 376 F. 2d 564 (C.A. 5). There would be no reason now to allow the unchallenged admission of that evidence to be a basis for a collateral attack on the conviction which was fully sustained by other evidence. See *Indiviglio v. United States*, 352 F. 2d 276, 281 (C.A. 2), certiorari denied, 383 U.S. 907.

The rules designed to assure orderly procedure and full development of the relevant facts at an appropriate time before trial would become meaningless under the holding for which petitioner contends. If a defendant who refrains from making a motion to

¹⁴ *Gray v. United States*, 311 F. 2d 126, 127 (C.A.D.C.), certiorari denied, 374 U.S. 838; *Smith v. United States*, 335 F. 2d 270, 274, n. 13 (C.A.D.C.); *Sykes v. United States*, 373 F. 2d 607 (C.A. 5), certiorari denied, 386 U.S. 977.

suppress before trial can, in effect make a delayed motion for suppression after the judgment has become final, there would be, particularly as to items not important to a conviction, strong motives to delay presentation of the issue. For then there is a good chance not only that memories will have become dim as to the circumstances of the search, but that the items of evidence can be endowed with significance they may not have had if the prosecution knew it had to be put to other proof. And if a new trial should be required, there is always the possibility that lapse of time will render retrial difficult or impossible. There is no reason to encourage such a result.

B. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES WHICH WARRANT CONSIDERATION OF PETITIONER'S CLAIM OF ILLEGAL SEARCH AND SEIZURE ON COLLATERAL ATTACK

1. The "exceptional circumstances" in which search and seizure claims not raised at trial or on appeal should be entertained collaterally reflect both the public's interest in preserving the deterrent effect of the exclusionary rule and the defendant's fundamental right to a fair hearing. We will not attempt to detail all of the particular situations in which an exception should be made. The basic inquiry, however, is whether there were any impediments to the defense's making an informed election whether to raise the claim, and if the claim is sought to be presented, whether the hearing on the claim was fundamentally fair. Suppression of material evidence or the knowing use of perjured testimony by the prosecution justifies collateral litigation of the claim as a means to disable

the government from concealing its own illegality.¹⁵ The discovery, after the judgment has become final, of significant evidence relative to the search would ordinarily entitle the defendant to raise the issue collaterally, if it reasonably appears that the absence of the evidence may have influenced the decision not to raise the claim. In the unlikely event that the conduct of the judge or the prosecutor denied the defendant a fair hearing on the search and seizure claim, and that error is not corrected on appeal, collateral review of the claim would also be warranted.

The above illustrations represent, we suppose, atypical situations. In most cases, like the present, collateral review is sought to be justified by reason of counsel's default in presenting the search and seizure claim at trial or on appeal. However, unless trial or appellate counsel's handling of a search and seizure claim is so grossly negligent—*e.g.*, failing to raise an obvious claim with respect to damaging evidence—as to constitute ineffective assistance under Sixth Amendment standards, collateral review of the search and seizure claim should not be available. *Thornton v. United States*, *supra*, 368 F. 2d at 829. In this context, the defendant's interest in an informed election and a fair hearing and the public's interest in the efficacy of the exclusionary rule coalesce. The defendant's enforcement of the exclusionary rule—which is made in a representative capacity on behalf of the public—is, like most other defenses available to an accused, committed largely to the skill and judgment of his counsel. When counsel makes a reasonable determination that it would be pointless to challenge the

¹⁵ Compare *Miller v. Pate*, 386 U.S. 1.

admissibility of seized evidence, or when his presentation of the claim is not constitutionally deficient, the concerns of both the public and the accused are satisfied.

2. In view of the evidence available to the government, trial counsel, who frequently consulted with petitioner (Tr. 481, A. 19), reasonably determined that the best defense was a claim of insanity. The evidence seized from the car was plainly immaterial to that defense, and did not warrant counsel's challenging its admission by motion to suppress (see A. 77). Since petitioner has shown himself fully alert as to his legal rights, that strategy manifestly met with his approval. The strategy having failed, petitioner now seeks an additional opportunity to persuade another jury. Neither the appellate process nor collateral relief was intended to afford a "trial by hindsight." *Kuhl v. United States*, 370 F. 2d 20, 23 (C.A. 9).

It is also clear from the record that appointed appellate counsel did consider the issue of search and seizure and did not deem it worthy of presentation before the court of appeals. We think this judgment was correct for a number of reasons—because the evidence was not important, because no motion to suppress had been made, and because the facts do not show an illegal search and seizure. Counsel's duty to his client is not well served by raising frivolous contentions. But even if other reasonable lawyers might have elected to argue the issue, that would not show incompetence of counsel nor neglect of duty. See *King v. Wainwright*, 368 F. 2d 57 (C.A. 5); *United States v. Follette*, 358 F. 2d 922 (C.A. 2); *Anderson v. Banan*, 250 F. 2d 654 (C.A. 6); *Taylor v. United States*, 238 F. 2d 409 (C.A. 9), certiorari denied, 353 U.S. 938;

Palakiko v. United States, 209 F. 2d 75 (C.A. 9). Moreover, when counsel was informed of petitioner's desire to assert a search and seizure claim, counsel took steps to do so.¹⁶ He arranged to have petitioner's wish to rely on *Preston* presented to the panel which heard the case. The fact that the panel did not mention the issue does not mean they did not consider it. For the reasons mentioned above—the unimportance of the evidence, the absence of a motion to suppress, the inapplicability of *Preston*—the court could have regarded the claim as too frivolous to warrant discussion.

III. THE TESTIMONY AT TRIAL PLAINLY SHOWS THAT THE EVIDENCE WAS LAWFULLY OBTAINED

Even if the Court should hold that petitioner may obtain collateral review of his search and seizure

¹⁶ Petitioner's statement. (in his affidavit attached to the brief in this Court) that "to the best of my memory, I told him [appellate counsel] that * * * evidence obtained from my person and my car subsequent to my arrest should have been excluded as evidence at my trial," (Br. App. B) contradicts petitioner's letter to appellate counsel which was written months after the filing of the brief and oral argument. In a letter dated April 26, 1965, petitioner wrote to counsel in pertinent part: "I have *discovered* a very serious and prejudicial [sic] error in the trial. * * * I have nothing but time to research, so please don't feel the fact that I *found* this error reflects on you in any way. * * *." (Br. App. D [emphasis added]). This letter almost conclusively indicates that petitioner urged counsel to present the alleged error only after briefing and oral argument, not before, as is asserted in his affidavit. This view is further supported by the affidavit of Mr. Diggs in which he states that "[f]ollowing my oral argument in the case Mr. Kaufman, by letter to me dated April 26, 1965, raised the issue of illegal search and seizure. * * * I had not raised the issue before the court, by brief or by oral argument, considering it to be of little merit" (Br. App. C).

claim, there would be no need to remand the case for a hearing on the merits of that claim. Although there was no motion to suppress, the testimony at trial contains sufficient facts to support a finding that the challenged evidence was not the product of an illegal search.

1. Since petitioner's motion to vacate sentence did not attack the validity of the search of his person, his present contention that the stolen money and the rental contract should not have been admitted in evidence is not properly before this Court. But, in all events, that contention is adequately refuted by the record. While the facts were not developed in detail, the evidence shows that those items were taken from petitioner during the routine procedures incident to an accused's detention in a station house (A. 98). Captain Peterson of the Alton Police Department testified that the personal effects removed from petitioner's person and inventoried by the police included "valuable items * * * such as money [and a] bill-fold" (A. 71). Petitioner does not challenge the legality of his arrest and detention in the station house on the "hit-and-run" charge, which is hardly a minor traffic violation. The search of his person to discover any concealed weapons and to remove valuable items was a necessary precaution to protect the police and to safeguard petitioner's property. See *Terry v. Ohio*, 392 U.S. 1, 22, 27; cf. *Preston v. United States*, 376 U.S. 364, 367.

2. The revolver was plainly admissible in evidence on any one of three grounds. In the first place, it was observed, in plain view, on the rear seat of the auto-

mobile (A. 65, 59). The discovery of the weapon, therefore, was not the result of a "search" within the meaning of the Fourth Amendment. *E.g.*, *Harris v. United States*, 390 U.S. 234; *Ker v. California*, 374 U.S. 23, 42-43. Second, the revolver was found and removed from the car by Cliff Martin, a private individual who had been called to tow the disabled vehicle off the street. The manner in which private citizens obtain evidence which is later turned over to the authorities is not measured by Fourth Amendment standards. *Burdeau v. McDowell*, 256 U.S. 465, 475. Finally, the record shows that Martin's conduct did not violate any duty owed to petitioner. Petitioner does not contend that Martin wrongfully took custody of the automobile. Martin clearly acted reasonably in removing a potentially lethal weapon from an unattended automobile and giving it to the F.B.I. agents, who had a right to possession of the revolver as the instrumentality of a federal offense.

3. The travelers' cheques, traffic summons, gasoline receipts, and Western Union receipt were found in the automobile by an F.B.I. agent after petitioner had been removed to the F.B.I. office in St. Louis (A. 78-79, 101). Petitioner does not contend that the agents lacked probable cause to take him into custody on a federal charge or to search the automobile (see pp. 6-8, *supra*). Relying on *Preston v. United States*, 376 U.S. 364, he argues only that the search was invalid because it was not conducted pursuant to a warrant.

In *Preston*, the Court held invalid a warrantless search made after the defendants had been arrested and jailed for vagrancy and after the automobile had

been driven off the street by the police and placed in a garage. In this case, however, the agents knew that the car, which had been in a serious accident, had been petitioner's get-away car and had been used to transport stolen money across a State line. The revolver which petitioner used had been found in the car, but the stolen travelers' cheques had not been recovered. And the agents also knew that the car did not belong to petitioner but had been rented by someone else. The search of the car "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained" (*Cooper v. California*, 386 U.S. 58, 61).

In almost identical circumstances in *Cooper*, this Court sustained a warrantless search of an automobile at a time and in a place remote from the arrest. Petitioner attempts to distinguish *Cooper* on the fact that in that case the car was seized under a State statute authorizing the forfeiture of vehicles used to facilitate the transportation of narcotics. But the important factor in both *Cooper* and the present case is that the petitioner was not entitled to immediate possession nor ultimate control of the car. In this case, the government had the right to immediate possession because the car was an instrumentality of the crime, to be held until petitioner's trial, and the owner of the car was entitled to ultimate possession. In these circumstances, a search without a warrant is reasonable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, Jr.,
Assistant Attorney General.

JOSEPH J. CONNOLLY,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
J. THOMAS CARROLL, Jr.,
Attorneys.

SEPTEMBER 1968.

NOV 9 1968

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

BRUCE R. JACOB

WILLIAM F. C. SKINNER, JR.

Emory University School of Law
Atlanta, Georgia 30322

Attorneys for Petitioner

INDEX

SUBJECT INDEX

	Page
Table of Cases	i
Statement of the Case and Facts	1
Argument	7
Conclusion	19
Certificate of Service	20

TABLE OF CASES

<i>Boruff v. United States</i> , 310 F.2d 918 (5th Cir. 1962)	18
<i>Cooper v. California</i> , 368 U. S. 58 (1967)	3
<i>Lyles v. United States</i> , 341 F.2d 917 (5th Cir. 1964), 346 F.2d 789 (5th Cir. 1965)	18
<i>Rosa v. United States</i> , 397 F.2d 401 (5th Cir. 1968)	18
<i>Thornton v. United States</i> , 368 F.2d 822 (D.C. Cir. 1966)	17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 53

HAROLD KAUFMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Statement of the Case and Facts

The brief for the respondent contains a number of incorrect and misleading factual statements. We wish to correct several of the more serious of these errors.

1. On page 41 of its brief the attorneys for the government made the statement that petitioner was arrested and detained by police in the Alton Police station house on a "hit-and-run" charge which, as they put it, "is hardly a minor traffic violation." Since the arrest was for more than a minor traffic violation, they reason, the search of his person to discover any concealed weapons was justified.

There is a major flaw in this reasoning—petitioner was not arrested for “hit-and-run,” as is claimed, but for a minor traffic offense. Alton policeman Charles Stahl, the arresting officer, testified before the United States District Court for the Southern District of Indiana, that the arrest, on December 16, 1963, following Kaufman’s accident in Alton, was for a traffic violation—reckless driving, for driving too fast for road conditions (page 20, transcript of pre-trial and trial proceedings in *U. S. v. Kaufman*, No. I. P. 64-Cr.-31, February 28, 1966).

2. At the bottom of page 19 and top of page 20 the government states:

“ . . . At the time the F.B.I. agent searched the automobile, it was known that it had been used as an instrumentality in the commission of a federal offense and that it did not belong to petitioner but had been rented by someone else. The automobile, therefore, was properly taken into custody; it was to be retained by federal authorities and then returned to its owner. The reason the car was seized, and the reason it was searched, were all the same. In almost identical circumstances this Court upheld a warrantless search in *Cooper v. California*, 386 U. S. 58.”

It is true that the car had been rented in the name of Arthur Cooper, a friend of Kaufman’s, in New York. However, as was pointed out in the Brief for Petitioner (pages 44 and 45), the car was rented by Cooper for Kaufman’s use and benefit, Kaufman had sent money to Cooper to extend the lease on the car, and Kaufman was fully entitled to use the car. Under these circumstances, the mere

fact that the car had been rented in Cooper's name did not entitle the F.B.I. to search it without a warrant in the Cliff Martin garage, where it had been impounded by the Alton City Police.

The government has erroneously implied, in the above-quoted excerpt, that, at the time F.B.I. agents searched the car without a warrant and seized evidence which was subsequently introduced against petitioner at his trial, the car had already been "seized," "taken into custody" by federal authorities and was in the process of being "retained by federal authorities" for the purpose of being "returned to its owner." These claims are completely unfounded. At the time the F.B.I. agents searched the car on the evening after the crime, the car was still located in the Cliff Martin garage, where it had been taken at the direction of officer Stahl of the Alton Police Department after he had arrested Kaufman for the traffic violation of reckless driving. It was impounded as a result of the arrest for reckless driving (A. 55), not because the car was an "instrumentality in the commission of a federal offense." The car was sent to the garage because it could not be left on the street. There is no showing in the record that the Alton Police had a right to impound the car other than for Kaufman's convenience. There is nothing in the record to indicate that, as of the time of the F.B.I. search, the Alton Police had transferred the car or their responsibility for or authority over the car (if they had such responsibility or authority), to the F.B.I. It cannot be said, therefore, that the search of the car was in any way similar to the search involved in *Cooper v. California*. There, officers arresting the defendant on a narcotics violation seized the car under state law which required them to do so due

to the fact that the vehicle had been used in the transportation of narcotics. Under the statute the police were required to hold the vehicle as evidence until "forfeiture has been declared or a release ordered." They searched the car a week after the arrest and found incriminating evidence. The police were not only authorized but required under state law to maintain a degree of control and possession during the forfeiture proceedings which was almost tantamount to title in the car. Under these circumstances the search was valid and was upheld by this Court. The F.B.I. had no such interest in the Kaufman car at the time it was searched.

3. In the original Brief for Petitioner in this case it was alleged that, during their search of petitioner's car, the F.B.I. found a receipt showing that the pistol used in the robbery had been purchased at Wittel's Gun Shop in Alton; that Wittel's Gun Shop and witness John Davis may have been connected to the robbery, traced and located by the F.B.I. through the use of this receipt; and, further, that if the search of the car was unlawful, as is claimed by petitioner, the entire testimony of John Davis was tainted as the "fruit" of an illegal search and seizure and should not have been introduced against Kaufman.

On page 25 of the brief for the government it is stated that the receipt referred to was found *on petitioner's person* by the Alton Police, *not in his car*, and is listed in the inventory of items which the Alton Police obtained in the search of his person and turned over to the F.B.I. In support of this statement, in footnote 7 on page 25, the government refers us to pages 84 and 85 of the printed Appendix in this case. There is a receipt referred to on those pages of the Appendix which fits the description of

the receipt on page 25 of the government's brief—"a receipt of Harold Kaufman for receipt of \$29.53." However, as is evident from a reading of page 82 of the Appendix, this receipt in the amount of \$29.53 which was listed in the inventory of items taken from Kaufman's person *was actually a receipt given to Kaufman by the police or F.B.I. for the difference between the total amount of money found on Kaufman's person after his arrest and the proceeds of the robbery. The receipt referred to on pages 82 and 84, thus, was not a receipt for purchase of the pistol, as has been claimed by the government.*

Petitioner still asserts that, to the best of his recollection, the receipt for the gun was obtained by the F.B.I. during the search of the car, not through the search of his person.

4. On page 39 of its brief the government makes the following statement:

"... The evidence seized from the car was plainly immaterial to [the defense of insanity] and did not warrant counsel's challenging its admission by motion to suppress Since petitioner has shown himself fully alert as to his legal rights, *that strategy manifestly met with his approval*" (Emphasis added)

There is nothing whatever in the record to indicate why Kaufman's trial attorney failed to file a motion to suppress evidence prior to trial. There is nothing in the record to indicate that there was even a conscious or deliberate decision on the part of counsel to forego the filing of a motion to suppress, and there is certainly no indication in any part of the record that Kaufman consciously or de-

liberately approved such a decision even if one were, in fact, made by counsel. The trial judge below in the evidentiary hearing on the motion to vacate under 28 U.S.C. § 2255 declined to allow the development of a full record on the search and seizure issue and, as a result, we have no knowledge why the motion to suppress was not made prior to trial. The above-quoted statement in the brief for the government, therefore, is inaccurate and extremely misleading.

5. In Kaufman's direct appeal from his conviction his appointed appellate attorney, Walter E. Diggs, Jr., did not formally raise the issue of whether Kaufman had been convicted illegally on the basis of evidence obtained through unlawful search and seizure. In his petition for writ of certiorari to this Court during 1965-66 (No. 1025, Misc., O.T. 1965), the search and seizure issue was raised.

The government states, on pages 19 and 39 of its brief, that counsel on appeal considered the search and seizure issue to be entirely without merit, and on page 12 it is stated that the 1965-66 petition for certiorari was a *pro se* petition. By these statements the government leaves the impression that, during the direct appeal and the subsequent proceedings for certiorari in this Court, Kaufman was the only person involved in the case who thought that the search and seizure issue had any merit—that no legally trained person saw any merit whatever to the issue during the 1965-66 proceedings. Actually, however, the certiorari proceeding was not a *pro se* proceeding, for Kaufman was represented by attorneys Robert O. Hetlage and Walter E. Diggs, Jr., the latter being the same attorney who had been involved in the direct appeal. Because he raised the

search and seizure issue in the certiorari proceedings, it is clear that Mr. Diggs, at that time, was of the belief that the search and seizure contention had merit.

ARGUMENT

I.

On page 23 of their brief the attorneys for the government make the statement that the evidence presented in petitioner's behalf on the sole issue involved at his trial—the issue of insanity—was “far from compelling.” This statement is untrue, as will be shown by the following brief summary of evidence favorable to Kaufman on the question of insanity.

Dr. Glotfelty, a psychiatrist who had been practicing that specialty for 18 years, examined Kaufman at the United States Medical Center, Springfield, Mo., during the early part of 1964. He testified that he and Doctors Rothstein and Weiland, at the Center, had concurred in a diagnosis of schizophrenic reaction, paranoid type in partial, rather stable remission (Tr. 225).

Dr. Waitzel, a psychiatrist, had diagnosed Kaufman in 1960 (Tr. 263) and at that time had entered a diagnosis of psychoneurotic reaction, other (severe) (Tr. 270). He had found Kaufman to have low self-esteem (Tr. 287), and an underlying schizoid personality (Tr. 279). He testified that in the life history of a schizophrenic person there is generally a pre-existing schizoid personality (Tr. 279). He had found Kaufman to have weak control over his impulses (Tr. 303), and was convinced, in 1960, that psychosis (a paranoid type of schizophrenia) could develop in Kauf-

man's case in the absence of treatment (Tr. 280). Based on the 1960 evaluation, plus Dr. Glotfelty's 1964 diagnosis, plus his own observations during the trial, Dr. Waitzel testified that although Kaufman could have distinguished right from wrong on December 16, 1963, he could have been subject to such severe anxiety and pressure on that date that he would have been incapable of controlling an impulse to commit a crime he knew to be wrong. (Tr. 293-295, 305, 313-316).

Patricia Scott first met Harold Kaufman in August, 1963, when he obtained her release from jail on bail (Tr. 128, 132). At the time she was in her sixth month of pregnancy, by some other man (Tr. 132), but in spite of this and in spite of the fact that he had just met her, he asked her to marry him (Tr. 137). She declined the offer. They shared an apartment for one and one-half weeks, and after that continued to live in the same building for several months and see each other constantly (Tr. 180, 131). He constantly told her that he loved her and wanted to marry her, but she never told him she loved him and she tried to make him leave her alone (Tr. 137, 163, 167). She told him that she'd marry him if he would give her \$10,000 because that is what it would take for her to live with him, and he responded by saying that he would raise the money (Tr. 137). Even though they lived together, they never had sexual relations (Tr. 167, 168). He was extremely jealous (Tr. 178) and when away from home would telephone her every half hour, all day long (Tr. 133). He kept telling her that he was more of a "man" than any of her previous lovers (Tr. 134, 162, 163, 168). He bragged what a famous criminal he was and his ambition was to make the F.B.I.'s "Ten Most Wanted" list (Tr. 150). He thought the police

were always following him (Tr. 151, 153). He gave all of his money away to others and never spent any money on himself (Tr. 136). He was extremely untidy (Tr. 136, 158, 159), and was a very poor driver (Tr. 163). She testified that he couldn't carry on a coherent conversation, and couldn't seem to remember anything said to him (Tr. 160). In her opinion, he was not sane (Tr. 171), and could not control his actions (Tr. 168).

Joseph Kiernan, a police detective, testified concerning the pressures to which Kaufman had been subjected prior to the crime, including his fear of death at the hands of a hoodlum (Tr. 192, 193, 215).

Even the prosecution's psychiatric witness, Dr. Weiland, gave a diagnosis of schizophrenic reaction, paranoid type in partial, rather stable remission (Tr. 334, 335), and admitted on cross examination that it was possible that Kaufman may have been at a stage in which he may not have been able to control his actions (Tr. 345).

II.

Four items obtained by the F.B.I. during their search of the car—a New York traffic ticket, receipts for gasoline, and a Western Union receipt—were introduced in evidence against Kaufman, over objection by his attorney, and these items were later commented upon by the prosecutor during his closing argument to the jury on the issue of insanity. It is petitioner's position that the misuse of these items in this manner seriously prejudiced him before the jury on that issue (Brief for Petitioner, pages 9-12, 42, 48).

As of the time of closing argument the defendant had presented evidence to establish his insanity. The prosecu-

tion had rebutted this with testimony of Dr. Weiland, a psychiatrist, who, although he diagnosed defendant's condition as schizophrenic reaction, paranoid type in partial, rather stable remission, stated that defendant could distinguish right from wrong (Tr. 335) and that he could find no evidence one way or the other whether, on the day of the crime, defendant had been unable to refrain from doing a wrongful act (Tr. 337, 342, 343, 345). The prosecution also produced a Dr. Davidson, a medical doctor but not a psychiatrist, who had examined Kaufman in F.B.I. headquarters at 9:00 p.m. on the day of the crime and who testified that, at that time, Kaufman appeared to be logical and coherent (Tr. 363, 364), and calm (Tr. 365). By its own count (see pages 26 and 27 of the government's brief) the government paraded before the jury a total of eight witnesses who had observed Kaufman on or about the day of the crime, all of whom testified concerning his *outward appearance of rationality* at that time. These witnesses testified that Kaufman "talked normally," "appeared not to be nervous," "appeared to be calm," "coherent," "logical," and "rational" in his speech and actions (for example, see A. 43, 52, 93, 96, 111, 119-121). We repeat, the emphasis in the use of these witnesses was on Kaufman's *actions, speech, and outward conduct*.

The legal test for determining insanity at the time of a crime is, of course, *subjective* rather than objective in nature. The outward appearance and conduct of the defendant, at or about the time of the offense are relevant in the determination of insanity, but the ultimate test is the *subjective test of mental capacity*, the question of *whether the defendant, at the time in question, had the mental capacity to entertain or formulate the criminal intent* which is a basic element in any true crime.

It is true, of course, that evidence of outward appearance and conduct has some relevance as shedding light on a defendant's inner thought processes. However, it is also true that evidence that a defendant appeared to be calm, coherent, outwardly rational, and able to plan his activities at or about the time of his crime is, in many cases, completely consistent with insanity. For example, the person who believes X is going to kill him unless he first kills X, or the person who hears voices from God telling him to kill Y may deliberately, coolly, calmly plan and execute these crimes and may outwardly appear to be rational at the time, and yet be thoroughly insane under the existing legal tests for insanity. Therefore, evidence by lay witnesses such as those used by the prosecution, showing apparent outward rationality must be presented to a jury with extreme caution so as not to leave the impression that these outward appearances, alone, establish sanity.

The prosecutor in the Kaufman case, in his argument to the jury on the insanity issue, referred to Patricia Scott's testimony that Kaufman had left New York for the purpose of "pulling a job" (A. 124), and that when he arrived in the St. Louis area he had stopped in Alton and purchased a revolver, using a false name (A. 123). This argument showed that Kaufman may have deliberately planned to commit a crime and been calm and outwardly rational throughout, but this is not inconsistent with his claim of insanity. He could have been quite insane, under the legal tests for insanity, at the time of the crime, and still have appeared to be quite deliberate, calm and rational to those who observed him.

In his closing argument, immediately before making the references to the four items of evidence described above, the prosecutor made the following statement:-

" . . . The only issue now remaining in the case is whether or not the defendant was legally sane"

" . . . I would like to . . . remind you it's a question of his insanity on December 16, 1963. Was he legally sane on that date? That is the question for you to determine. You may consider all of the evidence which has been introduced, but you come right back to the focal point, was he legally sane and criminally responsible for his act on December 16, 1963?

"In order for you to determine that, you *must* examine *what he did, how he did it, what were his actions*, what was his *condition* at that time. You may also consider *acts* previously, and *acts* after December 16, but you come right back to the point of what was his *condition* on December 16, 1963." (A. 123) (Emphasis added)

As has previously been indicated, the prosecutor had introduced in evidence a great mass of repetitive, cumulative evidence of witnesses who had testified as to Kaufman's outward appearance or condition of calmness, coherence and rationality at or about the time of the offense. This, then, was the immediate context in which the prosecutor's references to the illegally obtained items of evidence were made—the jurors had already been saturated with evidence as to Kaufman's outward appearance and the prosecutor had just commanded that they *must* examine and consider this evidence in determining the issue of insanity. In effect, he had virtually substituted a new test or standard for determining insanity—a test predicated upon outward appearance or actions—in place of the traditional test based upon subjective mental capacity to formulate criminal intent. He then continued with his argument as follows:

"Now, we have introduced evidence showing that the automobile he was driving on December 16, 1963, came from New York. Here is Exhibit 8, the Rental Contract for that automobile in the name of Arthur Cooper. Here is a traffic ticket, City of New York. I am trying to find the date on this ticket. I had it at one time—on December 14 of 1963. We showed you receipts for gasoline along the route between New York and St. Louis. We have here a receipt from the Western Union showing telegraphing of the money from Harrisburg, Pennsylvania, to New York City, to Mrs. Patiricia [sic] Scott, on December 15th.

"These are some of the things showing what he was *doing* when he was coming from New York to St. Louis in this automobile. . . ." (A. 123) (Emphasis added)

In the context in which this portion of the closing argument was made, the importance of outward physical acts on the issue of insanity had been greatly distorted and the significance of such acts as a guide in determining subjective mental capacity to entertain criminal intent had been made extremely unclear. In fact, the jury had been told, in effect, that if the outward conduct and appearance of the defendant was rational on or about the day of the robbery, he should be considered legally sane—that this is the sole criterion for determining sanity. In this immediate context, the evidence commented on by the prosecutor, showing that Kaufman was apparently rational enough to travel half way across the country, buy gasoline, telegraph money to his girl friend, etc., during the two days before the robbery, takes an increased significance in the

case. Before the jury, then, the evidence took on a significance on the insanity issue all out of proportion to its actual probative value, and the use of the evidence in this way was extremely prejudicial to the defendant.

The importance, from the prosecutor's standpoint, of the four illegally-obtained items of evidence which he referred to during the closing argument, is apparent from the following excerpt from the same prosecutor's brief in the direct appeal of the Kaufman case to the United States Court of Appeals for the Eighth Circuit:

"... There is no evidence in the record that any mental defect the defendant might have had was operative during the commission of the robbery. On the contrary, he left New York for the express purpose of committing a robbery for Christmas. The acquisition in New York City of the automobile used in the robbery in St. Louis, the driving of the automobile from New York City to St. Louis, the acquisition of the pistol used in the robbery, the mode and manner in which the robbery was committed, all indicate rational acts committed in furtherance of the original purpose coolly conceived of committing a robbery for Christmas." (Appellee's Brief in *Kaufman v. U. S.*, No. 17,834, U. S. Ct. of Appeals, Eighth Circuit, page 17)

To summarize, during his closing argument, the prosecutor made misleading statements indicating to the jury that the fact that Kaufman left New York for the purpose of committing a crime, and the fact that he appeared outwardly to be rational, calm, coherent, etc. before, at and after the robbery made it almost mandatory upon them to

find that he was sane at the time of the crime, even though this is not a *correct* application of the law of insanity. In this immediate context the prosecutor also referred to items of evidence which had been obtained through an illegal search and seizure, which showed that Kaufman had driven all the way from New York to St. Louis, had stopped along the way, purchased gas, sent a telegram, etc. In this context, in which the importance of actions and outward conduct of the defendant had been improperly stressed by the prosecutor, the references to the evidence concerning the trip from New York took on a significance on the issue of insanity which was much greater than the significance which it should have been accorded by the jury, based on its actual probative value.

III.

The attorneys for the government suggest (pages 32-34 of their brief) that in the area of Fourth Amendment rights there may be situations in which a state inmate may be entitled to relief in a federal court on habeas corpus while his counterpart in a federal institution may be denied relief under 28 U.S.C. § 2255 even though, presumably, the inmates have similar grounds for seeking collateral relief. Petitioner's position is that the difference in treatment would amount to an unconstitutional deprivation of the rights of the federal inmate in such situation. This argument was fully developed in the Brief for Petitioner, pages 23-28.

The government's suggestion is apparently based, at least in part, on the theory that state judges don't enforce federal rights, and that therefore state inmates need the protection of federal courts through habeas corpus, while

federal inmates have adequate protection of their constitutional rights by virtue of having been tried in federal courts and therefore don't need similar protection. This theory might be valid if all federal judges were perfect, but it is obvious that all judges, federal and state, being human, are capable of making mistakes in rulings on constitutional claims. Why, therefore, should a state inmate who has had a perfect trial before a state judge have any greater right to pursue his federal collateral remedy than a federal inmate whose trial judge failed to adequately protect his constitutional rights? It should further be pointed out that there are both state and federal inmates who have legitimate constitutional grounds for attacking their convictions, but whose grounds for relief are not supported by their trial records. In fact, the judges who tried them may not have been made aware of the existence of such grounds, during the trial stage. In these cases, no adequate review is possible through direct appeal, since the appellate court on direct appeal is limited to a consideration of only those matters which appear in the record. In such cases the only adequate relief available is the relief afforded through collateral attack, which allows the taking of new testimony and evidence and the development of the necessary additional record.

IV.

At present there is a conflict among the federal circuits on the question of whether and to what extent federal courts should consider search and seizure claims by federal inmates under 28 U.S.C. § 2255. (Brief for Petitioner, pages 20-23). The trial judge below, who had also been the judge at Kaufman's 1964 trial, in denying relief on the

search and seizure grounds raised in the 2255 motion, very briefly stated that the "record" did not substantiate the claim and, further, that search and seizure issues may be considered on appeal but not in a 2255 proceeding (A. 21). This ruling followed the strict rule in effect in the Eighth Circuit on this issue. Some of the other circuits follow more liberal rules.

The government apparently joins petitioner in disapproving of the harsh rule of the Eighth Circuit, for in its brief, at page 28, it praises the more liberal approach taken by the District of Columbia Circuit in *Thornton v. United States*, 368 F.2d 822 (D.C. Cir. 1966). That court indicated that a federal prisoner may be entitled to have his sentence set aside in a 2255 proceeding on a search and seizure ground, at least where exceptional circumstances are present which would require such result.

In our case, of course, the district court didn't consider special circumstances and never even got to the point of allowing petitioner to show the existence of special or exceptional circumstances. Petitioner was apparently not allowed to introduce new evidence and develop an additional record on his search and seizure issue or on the question of whether any exceptional circumstances were present in his case.

Of course, if the 2255 court below had allowed petitioner to present evidence to show such special or exceptional circumstances, petitioner would have been entitled to relief. For, as was explained in detail in the Brief for Petitioner (pages 12-15, 18, 19, 28-34), Kaufman was denied direct appellate review of his illegal search and seizure claims due to failure of his court-appointed appellate attorney to

raise these claims properly; through misleading advice by the clerk of the appellate court; and through failure of the court to consider the issue after it had been raised informally. This amounts to a deprivation of the right to effective representation by counsel. Under these circumstances, Kaufman should have been entitled to a delayed appeal and to have his case reviewed by the 2255 court as if on direct appeal [see *Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962); and *Lyles v. United States*, 341 F.2d 917 (5th Cir. 1964), 346 F.2d 789 (5th Cir. 1965)]. In addition, he should have also had the option to present new evidence in support of his allegations, to supplement the trial record (see *Rosa v. United States*, 397 F.2d 401 (5th Cir. 1968)).

There are cases in which a prisoner should be entitled to raise search and seizure claims under § 2255 even in the absence of "exceptional circumstances" such as the denial of the constitutional right to counsel. For instance, if, after the trial, the defendant learns information or obtains evidence which would have been helpful to him in presenting his search and seizure claims at the trial, he should be allowed to present this newly discovered information or evidence in a 2255 proceeding. Another example of this might be the case of the defendant who, after waiving counsel, pleads guilty after being induced to do so by the knowledge that the police have overwhelming evidence against him, not realizing at the time that the evidence was illegally obtained and is therefore inadmissible.

Conclusion

Petitioner requests that the decision of the court below be reversed and that he be accorded the relief requested in his original brief.

Respectfully submitted,

BRUCE R. JACOB

WILLIAM F. C. SKINNER, JR.

Emory University School of Law
Atlanta, Georgia 30322

Attorneys for Petitioner

Certificate of Service

I, **BRUCE R. JACOB**, certify that on the day of November, 1968, I served copies of the foregoing brief, upon Miss Beatrice Rosenberg, Criminal Division, Department of Justice, Washington, D. C.

SUPREME COURT OF THE UNITED STATES

No. 53.—OCTOBER TERM, 1968.

Harold Kaufman, Petitioner	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
v.		
United States.		

[March 24, 1969.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question here is whether the claim of a federal prisoner that he was convicted on evidence obtained in an unconstitutional search and seizure is cognizable in a post-conviction proceeding under 28 U. S. C. § 2255.¹

Petitioner was tried and convicted in the District Court for the Eastern District of Missouri on charges of

¹ The pertinent provisions of 28 U. S. C. § 2255 are:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the . . . sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the

armed robbery of a federally insured savings and loan association. At trial, petitioner's only defense was insanity: The Court of Appeals for the Eighth Circuit, on petitioner's direct appeal, affirmed the conviction. *Kaufman v. United States*, 350 F. 2d 408 (1965).

Petitioner then filed this post-conviction proceeding under § 2255 and included a claim that the finding of sanity was based upon the improper admission of unlawfully seized evidence.² After an evidentiary hearing, the District Judge, who had also presided at petitioner's trial, denied relief with a written opinion. As respects the claim of unlawful search and seizure, the opinion states that "The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack on the instant § 2255 motion." 268 F. Supp. 484, 487 (1967). Petitioner's applications to the District Court and the Court of Appeals for the Eighth Circuit for leave to appeal *in forma pauperis* were denied.

We treat the actions of the District Court and the Court of Appeals as grounded on the view consistently followed by the Court of Appeals that claims of unlawful search and seizure "are not proper matters to be pre-

prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

² Petitioner initiated the § 2255 proceeding by a *pro se* motion. The only claim presented was denial of effective assistance of counsel. The District Judge ordered a hearing and appointed counsel to assist petitioner. Counsel filed a supplemental motion presenting two additional claims, one of which was that the search of petitioner's automobile was illegal.

sented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction."³ Other courts of appeals have indicated a contrary view.⁴ In light of the importance of the issue in

³ *Warren v. United States*, 311 F. 2d 673, 675 (1963); see also *Springer v. United States*, 340 F. 2d 950 (1965); *Peters v. United States*, 312 F. 2d 481 (1963); *Gendron v. United States*, 340 F. 2d 601 (1965). Accord: *United States v. Re*, 372 F. 2d 641 (C. A. 2d Cir. (1967)); *United States v. Jenkins*, 281 F. 2d 193 (C. A. 3d Cir. (1960)); *Armstead v. United States*, 318 F. 2d 725 (C. A. 5th Cir. (1963)); *Eisner v. United States*, 351 F. 2d 55 (C. A. 6th Cir. (1965)); *De Welles v. United States*, 372 F. 2d 67 (C. A. 7th Cir. (1967)); *Williams v. United States*, 307 F. 2d 366 (C. A. 9th Cir. (1962)).

We have not overlooked that the District Court's statement that "this matter was not assigned as error on Kaufman's appeal from conviction . . ." suggests that in any event failure to appeal the conviction renders the § 2255 remedy unavailable. This suggestion is contrary to our decisions that failure to take a direct appeal from conviction does not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims; the question rather is whether the case is one in which refusal to exercise that power would be appropriate. See *Fay v. Noia*, 372 U. S. 391, 438-440 (1963); *Henry v. Mississippi*, 379 U. S. 443, 451-452 (1965).

This certainly is not a case where there was a "deliberate by-pass" of a direct appeal. Appointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission as error either in his brief or on oral argument of the appeal. After oral argument of the appeal, however, petitioner wrote a letter to appellate counsel asking him to submit to the Court of Appeals a claim of illegal search and seizure of items from his automobile. Counsel forwarded petitioner's letter to the Clerk of the Court of Appeals who notified counsel that petitioner's letter had been given to the panel which had heard and was considering the appeal. The opinion of the Court of Appeals affirming petitioner's conviction does not appear to pass on the search and seizure claim.

⁴ *United States v. Sutton*, 321 F. 2d 221 (C. A. 4th Cir. (1963)); *Gaitan v. United States*, 317 F. 2d 494 (C. A. 10th Cir. (1963)).

the administration of § 2255 we granted certiorari. 390 U. S. 1002 (1968). We reverse.

The authority of the federal courts to issue the writ of habeas corpus was incorporated in the very first grant of federal court jurisdiction made by the Judiciary Act of 1789, c. 20, § 14, 1 Stat. 81-82; with the limiting provision that "writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States" Common law principles initially determined the scope of the writ. *Ex parte Bollman*, 4 Cranch 75, 93-94 (1807). In 1867, however, the writ was extended to state prisoners, and its scope was expanded to authorize relief, both as to federal and state prisoners, in "all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law of the United States. . . ." Act of February 5, 1867, c. 28, § 1, 14 Stat. 385.

Section 2255 revised the procedure by which federal prisoners are to seek such relief but did not in any respect cut back the scope of the writ. The section was included in the 1948 revision of the Judicial Code "at the instance of the Judicial Conference [of the United States] to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings *by affording the same rights in another and more convenient forum.*" *United States v. Hayman*, 342 U. S. 205, 219 (1952) (italics supplied);⁵

⁵ Among the serious administrative problems under habeas corpus practice in the case of federal prisoners was that created by the

"the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill v. United States*, 368 U. S. 424, 427 (1962). Thus, we may refer to our decisions respecting the availability of the federal habeas remedy in deciding the question presented in this case.

We noted in *Fay v. Noia*, 372 U. S. 391, 409 (1963) that "[t]he course of decisions of this Court . . . makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas even though imposed pursuant to the conviction of a federal court of competent jurisdiction."* We have given the same recognition to constitutional claims in § 2255 proceedings. See, e. g., *United States v. Hayman*, *supra*; *Sanders v. United States*, 373 U. S. 1 (1963); *Jordan v. United States*, 352 U. S. 904 (1956). The courts of appeals which have denied cognizance under § 2255 to unconstitutional search and seizure claims have not generally supplied reasons supporting their apparent departure from this course of our decisions. Rather, these courts have made the bald statement, variously expressed, that a motion under § 2255 cannot be used in lieu

requirement that the action be brought in the district of confinement, where the records of the case were often not readily available. Section 2255 changed this to require an application by motion filed in the sentencing court. See *United States v. Hayman*, 342 U. S. 205, 212-219 (1952).

* See, e. g., *Ex parte Lange*, 18 Wall. 163 (1874); *Ex parte Wilson*, 114 U. S. 417 (1885); *Callan v. Wilson*, 127 U. S. 540 (1888); *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Bowen v. Johnston*, 306 U. S. 19 (1939); *Waley v. Johnston*, 316 U. S. 101 (1942); *Von Moltke v. Gillies*, 332 U. S. 708 (1948); see also cases collected in *Fay v. Noia*, 372 U. S. 391, 409, n. 17.

of an appeal.' It is true that in *Sunal v. Large*, 332 U. S. 174, 179 (1947), we held that "the writ is not designed for collateral review of errors of law committed by the trial court—the existence of any evidence to support the conviction, irregularities in the grand jury procedure, departure from a statutory grant of time in which to prepare for trial, and other errors in trial procedure which do not cross the jurisdictional line." But we there recognized that federal habeas relief for constitutional claims asserted by federal prisoners is not limited by that rule. 332 U. S., at 182; see also *Hill v. United States*, *supra*, at 428 (1927). Later, in *Townsend v. Sain*, 372 U. S. 293, 311–312 (1963), we pointed out the vital distinction between the appellate and habeas functions which requires that habeas relief not be denied solely on the ground that relief should have been sought by appeal to prisoners alleging constitutional deprivations:

"The whole history of the writ—its unique development—refutes a construction of the federal courts'

⁷ See, e. g., "A motion under § 2255 cannot be made the substitute for an appeal," *Peters v. United States*, *supra*, n. 3, at 482 (C. A. 8th Cir.); "Section 2255 provides for a collateral attack on a judgment of conviction and is not a substitute for appeal for alleged errors committed at the trial," *Eisner v. United States*, *supra*, n. 3, at 57 (C. A. 6th Cir.); "Questions concerning the admissibility of evidence obtained directly or indirectly as a result of an unlawful search can be reviewed on an appeal from a judgment of conviction, but cannot be dealt with in a section 2255 proceeding," *Williams v. United States*, *supra*, n. 3, at 367 (C. A. 9th Cir.); "It has long been the law that habeas corpus and § 2255 will not be allowed to do service as an appeal, and that so far as federal prisoners are concerned, failure to appeal will normally bar resort to post-conviction relief," *Nash v. United States*, 342 F. 2d 366, 367 (C. A. 5th Cir. 1965). These paraphrase the statement in *Sunal v. Large*, 332 U. S. 174, 178 (1947), that "the writ of *habeas corpus* will not be allowed to do service for an appeal," but that statement was made in the context of an alleged nonconstitutional trial error. See *United States v. Sobell*, 314 F. 2d 314, 322–323 (C. A. 2d Cir. 1963).

habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the gravest allegations The language of Congress, the history of the writ, the decisions of this Court; all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

The Government suggests another rationale for denying post-conviction relief to federal prisoners with illegal search and seizure claims. The denial of Fourth Amendment protection against unreasonable searches and seizures, the Government's argument runs, is of a different nature than denials of other constitutional rights which we have held subject to collateral attack by federal prisoners. For unlike a claim of denial of effective counsel or of violation of the privilege against self-incrimination, as examples, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers. This deterrent function, the Government argues, is adequately served by the opportunities afforded a federal defendant to enforce the exclusionary rule before or at trial, so that the relatively minimal additional deterrence afforded by a post-conviction remedy would not seem to justify, except in special circumstances, the collateral release of guilty persons who did not raise the search and seizure

issue at trial or on direct appeal. In sum, the Government sponsors adoption by this Court of the rule announced in the majority opinion of the Court of Appeals for the District of Columbia in *Thornton v. United States*, 368 F. 2d 822, 824 (1966), that in the absence of a showing of "special circumstances" a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction.

The Government concedes in its brief that we have already rejected this approach with respect to the availability of the federal habeas corpus remedy to state prisoners. This rejection was premised in large part on a recognition that the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake. Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial. See, e. g., *Mancusi v. DeForte*, 392 U. S. 364 (1968); *Carafas v. LaVallee*, 391 U. S. 234 (1968); *Warden v. Hayden*, 387 U. S. 294 (1967); see also *Henry v. Mississippi*, 379 U. S. 443, 452 (1965). The Government argues, however, that federal post-conviction relief should not be available to federal prisoners in as broad a range of cases as that cognizable when presented by state prisoners. Support for this proposition is drawn from the fact that considerations which this Court, in *Fay v. Noia*, *supra*, deemed justifications for affording a federal forum to state prisoners—e. g., the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions—do not

obtain with respect to federal prisoners. Thus, we are told that the federal prisoner, having already had his day in federal court, stands in a different position with regard to federal collateral remedies than does the state prisoner. Conceding this distinction, we are unable to understand why it should lead us to restrict completely or severely access by federal prisoners with illegal search and seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners.

The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief, otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

In *Townsend v. Sain, supra*, at 313, 318 (1963), we set down the circumstances under which a federal court must review constitutional claims—including, of course, claims of illegal search and seizure—presented by state prisoners:

“If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.”

"In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge."

Of these, only the duty of the federal habeas court to scrutinize "the fact-finding procedure" under (3) does not apply in the case of a federal prisoner; federal fact-finding procedures are by hypothesis adequate to assure the integrity of the underlying constitutional rights. Thus, when a request for relief under § 2255 asserts a claim of unconstitutional search and seizure which was tested by a motion to suppress at or before trial under Fed. Rule Crim. Proc. 41 (e), the § 2255 court need not stop to review the adequacy of the procedure established by that Rule. In this respect, and in this respect only, the position of the federal prisoner does differ from that of the state prisoner. We perceive no differences between the situations of state and federal prisoners which should make allegations of the other circumstances listed in *Townsend v. Sain* less subject to scrutiny by a § 2255 court.⁸

⁸ Where a trial or appellate court has determined the federal prisoner's claim, discretion may in a proper case be exercised against the grant of a § 2255 hearing. Section 2255 provides for hearing "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief" In *Sanders v. United States*, 373 U. S. 1 (1963), we announced standards governing the determination whether a hearing should be ordered in the case of a successive motion under § 2255. Similarly, where the trial or appellate court has had a "say" on a federal prisoner's claim, it may be open to the § 2255 court to determine that on the basis of the motion, files, and records, "the prisoner is entitled to no relief." See *Thornton v. United States*, 368 F. 2d 822, 833 (C. A. D. C. Cir. 1966) (dissenting opinion of Wright, J.).

Furthermore, the § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately by-passed the orderly federal procedures provided at or before trial and by way of appeal—e. g., motion to suppress under Fed. Rule Crim. Proc. 41 (e) or appeal under Fed. Rule App. Proc. 4 (b). *Fay v. Noia*, *supra*, n. 3, at 438; *Henry v. Mississippi*, *supra*, n. 3, at 451–452.

The approach adopted by the court in *Thornton* and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post-conviction relief. In *Fay v. Noia, supra*, at 424, a case involving a state prisoner who claimed that his confession was coerced, we said that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." The same view was expressed in *Sanders v. United States, supra*, at 8 (1963), a case involving a federal prisoner: "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." This philosophy inheres in our recognition of state prisoners' post-conviction claims of illegal search and seizure. Plainly the interest in finality is the same with regard both federal and state prisoners. With regard to both, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims. Federal prisoners are no less entitled to such consideration than are state prisoners. There is no reason to treat federal trial errors as less destructive of constitutional guarantees than state trial errors, nor to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.

We cannot agree with the suggestion in MR. JUSTICE BLACK's dissent that the weight to be accorded the bene-

fits of finality is as controlling in the context of post-conviction relief as in the context of retroactive relief. The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively. Thus, collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process.

More fundamentally, the logic of his dissent cannot be limited to the availability of post-conviction relief. It brings into question the propriety of the exclusionary rule itself. The application of that rule is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures. As we said in *Miller v. United States*, 357 U. S. 301, 313 (1958):

"We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness. . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."

Finally, MR. JUSTICE BLACK's reliance on petitioner's concession of participation in the robbery is misplaced.

That concession is irrelevant in light of petitioner's defense at trial based on insanity. Surely that defense, no more than any other defense, cannot be prejudiced by the admission of unconstitutionally seized evidence.

We thus reject the rule announced in the majority opinion in *Thornton* and adopt the reasoning of Judge Wright's dissent in that case, 368 F. 2d, at 831:

"There is undoubtedly a difference in the way federal courts should treat post-conviction applications by state and federal prisoners. *Brown v. Allen*, *supra*, at 508, 73 S. Ct. 397 (opinion of Mr. Justice Frankfurter), interprets 28 U. S. C. § 2241 as requiring federal courts to have the 'last say' with respect to questions of federal law. Federal prisoners applying for collateral relief often have had their constitutional claims passed on by federal courts at trial or on appeal, so the *Brown v. Allen* rationale for federal court relitigation is inapposite. But this difference provides no basis for limiting the grounds upon which federal prisoners may obtain collateral relief, or for formulating a separate set of rules to determine when a federal prisoner's claim has adequately been adjudicated. Where a federal trial or appellate court has had a 'say' on a federal prisoner's claim, there may be no need for collateral relitigation. But what if the federal trial or appellate court said nothing because the issue was not raised? What if it is unclear whether the 'say' was on the merits? What if new law has been made or facts uncovered relating to the constitutional claim since the trial and appeal? What if the trial or appellate court based its rulings on findings of fact made after a hearing not 'full and fair' within the meaning of *Townsend v. Sain*, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963)? All these problems are common to state and federal

prisoners, and the interest in finality operates equally in both situations. These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded. It would be anomalous indeed, especially in light of the interest in maintaining good federal-state relations, if defaults not precluding one adequate federal review for the constitutional claims of state prisoners precluded such a review for federal prisoners, or if defects rendering state court adjudications inadequate did not similarly affect federal court adjudications."

We therefore hold that a claim of unconstitutional search and seizure is cognizable in a §.2255 proceeding. The order of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 53.—OCTOBER TERM, 1968.

Harold Kaufman, Petitioner,	} On Writ of Certiorari to	
v.		the United States Court
United States.		of Appeals for the Eighth Circuit.

[March 24, 1969.]

MR. JUSTICE BLACK, dissenting.

Petitioner Kaufman was convicted of robbing a bank while armed with a pistol. Part of the evidence used against him was a revolver, some of the stolen travelers checks, a money order receipt, a traffic summons and gasoline receipts. During the trial petitioner's counsel conceded that petitioner had committed the robbery but contended he was not responsible for the crime because he was mentally ill at the time. An appeal from his conviction was rejected by the Court of Appeals, 350 F. 2d 408 (C. A. 8th Cir. (1965)), and we denied certiorari, 383 U. S. 951 (1966). Three months later—after the decision had become what is generally considered “final”—he filed in the Federal District Court the present motion under 28 U. S. C. § 2255, asking that his sentence be vacated on the ground, among others, that the trial court had committed error in not suppressing the evidence against him because the articles had been obtained by an unlawful search and seizure. Despite the fact that he has never, either in his trial or in this proceeding, asserted that he had not actually physically committed the robbery with a pistol, and despite the fact that this plainly reliable evidence clearly shows, along with the other evidence at trial, that he was not insane, the Court is reversing his case, holding that he can collaterally attack the judgment after it had become final. I dissent.

My dissent rests on my belief that not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final. This conclusion is supported by the language of § 2255 which clearly suggests that not every constitutional claim is intended to be a basis for collateral relief.¹ And, as this Court has said in *Fay v. Noia*, with reference to habeas corpus,

"Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243" 372 U. S. 391, 438.

Of course one important factor that would relate to whether the conviction should be vulnerable to collateral attack is the possibility of the applicant's innocence. For illustration, few would think that justice requires release of a person whose allegations clearly show that he was guilty of the crime of which he had been convicted.

I agree with the Court's conclusion that the scope of collateral attack is substantially the same in federal habeas corpus cases which involve challenges to state convictions, as it is in § 2255 cases which involve challenges to federal convictions. The crucial question, however, is whether certain types of claims, such as a claim to keep out relevant and trustworthy evidence because the result of an unconstitutional search and seizure, should normally be open in these collateral proceedings.

¹ "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been *such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack*, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U. S. C. § 2255. (Emphasis supplied.)

This question was fully and carefully considered by the Court of Appeals for the District of Columbia Circuit in *Thornton v. United States*, — U. S. App. D. C. —, 368 F. 2d 822 (1966), and I agree substantially with the opinion of Judge Leventhal for the majority of that court, which states: ²

"[G]enerally a claim by a federal prisoner that evidence admitted at his trial was the fruit of an unconstitutional search or seizure is not properly the ground of a collateral attack on his conviction. As further noted below, this rule is subject to an exception for special circumstances

"Many opinions declare that collateral attack, as by habeas corpus, is available to correct the denial of a constitutional right. This is the general rule but it is not an absolute. . . .

"The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there is no imperative to provide additional collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary."

It was formerly the rule in this country that judgments were so impervious to collateral attack that a defendant could not collaterally attack his conviction even after the Government had admitted his innocence. That rule, obviously a harsh and what might seem

² — U. S. App. D. C., at —, 368 F. 2d, at 824-826.

to most people an indefensible one, has of course now been abandoned. It was finally put to rest in *Fay v. Noia*, 372 U. S. 391 (1962). It is this element of probable or possible innocence that I think should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process.³ In *Fay v. Noia*, Noia and his two codefendants had been convicted of felony murder in New York state court and each had been sentenced to life imprisonment. The sole evidence against each defendant was his confession. While his codefendants appealed, Noia did not, for fear that if he secured a reversal and was reconvicted at a second trial, he would be sentenced to death. The confessions of the two codefendants were subsequently found by the Court of Appeals for the Second Circuit to have been coerced by practices that court described as "satanic." *United States ex rel. Caminito v. Murphy*, 222 F. 2d 698, 701 (1955). The convictions of Noia's two codefendants were reversed, and since there was no evidence other than the coerced confessions that any of the three were guilty, the State declined to re prosecute them and they were set free. *United States ex rel. Noia v. Fay*, 183 F. Supp. 222, 227, n. 6 (1960). Noia, however, languished in prison, even though his alleged confederates had been released. Both the New York courts and the Federal District Court declined to review his case on the ground that his 1942 failure to appeal made his conviction "final." He remained in jail despite the fact that he "continuously asserted his innocence of the crime for which he had been convicted" in his petition for habeas corpus and elsewhere. See p. 8, Transcript of Record in No. 84, October Term, 1962.

³ See Mishkin, The Supreme Court, 1964 Term—Foreword, 79 Harv. L. Rev. 56, 79-86 (1965).

It was under these circumstances, strongly appealing to the court's sense of what justice required, that this Court held that Noia was entitled to challenge his conviction even though it had previously become "final." My Brother HARLAN, dissenting, concluded that no matter how appealing the circumstances, one wrongly convicted must be consigned to the slow, tedious, and uncertain road to whatever relief he might possibly get from the chief executive. On the contrary, I agreed with *Fay v. Noia* as one of the bright landmarks in the administration of criminal justice. But I did not think then and do not think now that it laid down an inflexible rule compelling the courts to release every prisoner who alleges in collateral proceedings some constitutional flaw, regardless of its nature, regardless of his guilt or innocence, and regardless of the circumstances of the case. The Court's opinion in *Noia* shows, from beginning to end, that the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant. The court repeatedly emphasized that the only evidence against Noia was a coerced confession and that he remained in jail while the State permitted his alleged confederates to go free. The Court made it clear that equitable considerations such as these should play a part in determining the availability of federal habeas corpus:

"Although we hold that the jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during state court proceedings, we recognize a limited discretion in the federal judge to deny relief to an applicant under certain circumstances. Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, 'dispose of the matter as law and justice require,' 28 U. S. C. § 2243; and discretion was the flexible concept employed by the federal

courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles.”⁴

And in its closing paragraph, the Court stressed:

“Today as always few indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.”⁵

Surely, it cannot be said of Kaufman, an admitted armed robber, that he is a person whom “society has grievously wronged and for whom belated liberation is little enough compensation.”

Although, as the Court of Appeals indicated in the *Thornton* case, habeas corpus has been thought of broadly as a means of securing redress for the violation of any “constitutional right,” it was true until *Mapp v. Ohio*, 367 U. S. 643 (1961), that almost every “constitutional right” referred to in this sense played a central role in assuring that the trial would be a reliable means of testing guilt. It is true that the prohibition against coerced confessions has been vigorously enforced even in the absence of proof that the confession itself was unreliable, *e. g.*, *Rogers v. Richmond*, 365 U. S. 534 (1961), but even this prohibition rests to a substantial extent on recognition that all such confessions “may be and have been, to an unascertainable extent, found to be untrustworthy,” *id.*, at 541.

A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means

⁴ 372 U. S. 391, 438.

⁵ 372 U. S. 391, 440-441.

of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty. A good example of such a case is one in which I filed a dissent today, *Harris v. Nelson*, ante, p. —. The prisoner in *Harris* was convicted on a charge that he had been in possession of marijuana, possession alone being a crime under state law. He later collaterally attacked that conviction, alleging that the marijuana had been unlawfully seized from his home, where he had been in illegal possession of it. He did not and evidently could not allege a single fact that would indicate the slightest possibility that he actually was innocent of the crime charged. Under these circumstances it implies no disrespect for the importance of the Fourth Amendment to recognize the simple proposition that treatment of search and seizure claims should correspond to the purpose of the Fourth Amendment exclusionary rule. As the Court of Appeals said in *Thornton*:⁶

“Our rejection of the availability of collateral review for claims of unreasonable search and seizure (in the absence of exceptional circumstances) is not attributable to low regard for the significance of the Fourth Amendment in our times and our civilization. On the contrary, the magnitude of the Fourth Amendment in our constitutional constellation has prompted unusual remedies by Congress, as well as the courts. . . . The corollary, however, is a contraction of the need for enlarging collateral review in order to ensure effective vindication of the constitutional interests involved.”

The purpose of the exclusionary rule, unlike most provisions of the Bill of Rights, does not include, even to the slightest degree, the goal of insuring that the guilt-

⁶ — U. S. App. D. C., at —, 368 F. 2d, at 826.

determining process be reliable. Rather, as this Court has said time and again, the rule has one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police. As the Court said in *Linkletter v. Walker*, 381 U. S. 618, 636-637 (1965):

"*Mapp* had as its primary purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* [v. *Colorado*, 338 U. S. 25 (1949)] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."

How this purpose can be served by the broad and unqualified rule adopted by the Court today is something of a mystery. Of course, the shortcomings inherent in any human system make it impossible to eliminate entirely all the incentives to conduct an illegal search. It would seem rather fanciful, however, to suggest that these inevitable incentives would be decreased to any significant extent by the fact that if a conviction is obtained, after adequate opportunities have been provided to litigate constitutional claims, and if this conviction is upheld by all the reviewing courts, the validity of the search and seizure may later be questioned in a collateral proceeding. Understandably, the Court does not make any such suggestion and indeed makes no effort to justify its result in terms of the long-recognized deterrent purpose of the exclusionary rule. The Court instead simply provides us with a string of citations that supposedly settle the question, at least as to state convictions, *ante*, p. 8, but the Court neglects to mention that not one of the cases it cites contains a single intimation that the issue before us now was even considered.⁷

⁷ Only one of these decisions, *Mancusi v. DeForte*, 392 U. S. 364 (1968), actually ordered the granting of habeas relief on the basis

The only other justification for the Court's result that can be gleaned from its opinion is the statement that the reasoning of the Court of Appeals in *Thornton* "exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights." *Ante*, p. 10. This astonishing statement is directly contrary to the principles this Court has consistently applied on this subject, as for example in *Elkins v. United States*, 364 U. S. 206, 217 (1960), where we said: "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." This same recognition that no personal right of the prisoner can be vindicated in these Fourth Amendment cases was stressed in this Court's opinion in *Linkletter*, *supra*: "We cannot say that this [deterrent] purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." 381 U. S., at 637.

The Court's consistent adherence to this approach has continued through all of the various "retroactivity" cases, including today's decision in *Desist v. United States*, *ante*, p. —, in which the Court emphasizes, quoting from *Linkletter*, that "The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoner involved," and that "the exclusionary rule is but a 'procedural weapon that has

of a search and seizure claim, and in *Mancusi* (as in *Warden v. Hayden*, 387 U. S. 294 (1967)) the issue was not even theoretically before us since only in the most exceptional case would we have considered a question not mentioned in the State's petition for a writ of certiorari.

no bearing on guilt.' " It would be hard to find a more apt summary of this Court's holdings in these "retroactivity" cases than the statement that they "exal[t] the value of finality of criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights." But since this is the course the Court has chosen to steer, I think it would not be amiss to suggest that the Court at least decide this case on the same principles and seek to achieve a modest semblance of consistency. Instead the Court adopts a rule that offers no discernible benefits in enforcing the Fourth Amendment and insures that prisoners who are undoubtedly guilty will be set free.

It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal. One commentator, who attempted in vain to dissuade this Court from today's holding, thought it necessary to point out that there is "a strong public interest in convicting the guilty."⁸ Indeed the day may soon come when the ever-cautious law reviews will actually be forced to offer the timid and uncertain contention, recently suggested satirically, that "crime may be thought socially undesirable, and its control a 'valid governmental objective' to which the criminal law is 'rationally related.'"⁹

I cannot agree to a rule, however technical it may seem, that leads to these results. I would not let any criminal conviction become invulnerable to collateral attack where there is left remaining the probability or possibility that constitutional commands related to the integrity of the fact-finding process have been violated. In such situations society has failed to perform its obli-

⁸ Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 389 (1964).

⁹ 79 Harv. L. Rev., parody ed., p. 12 (March 1966).

gation to prove beyond a reasonable doubt that the defendant committed the crime. But it is quite a different thing to permit collateral attack on a conviction after a trial according to due process when the defendant clearly is, by the proof and by his own admission, guilty of the crime charged. There may, of course, as the Court of Appeals held in the *Thornton* case, be some special circumstances in which allowance of a Fourth Amendment claim in a collateral proceeding would be justified in terms of the relevant and applicable constitutional principles. Some of the situations possibly falling in this category have been enumerated and examined by others.¹⁰ and there are circumstances alleged here that might lead to such a disposition of this case.¹¹ But the Court does not rest its judgment on this narrow ground, and I therefore do not attempt to pass on it. I do contend, however, that the court below was right here in refusing to follow the broad rule that this Court is announcing today. In collateral attacks whether by habeas corpus or by § 2255 proceedings, I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt. This defendant is permitted to attack his conviction collaterally although he conceded at the trial and does not now deny that he had robbed the bank and although the evidence makes absolutely clear that he knew what he was doing. Thus, his guilt being certain, surely he does not have a constitutional right to get a new trial. I cannot possibly agree with the Court.

¹⁰ *Thornton v. United States*, *supra*; *Amsterdam*, *supra*, at 391-392, n. 60.

¹¹ Petitioner's allegations suggest that he may have been unjustifiably frustrated in his efforts to raise the search and seizure issue on direct appeal from his conviction. See the Court's opinion, *ante*, p. 3, n. 3.



SUPREME COURT OF THE UNITED STATES

No. 53.—OCTOBER TERM, 1968.

Harold Kaufman, Petitioner,	}	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.
v.		
United States.		

[March 24, 1969.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I concur in much of my Brother BLACK's opinion, and agree with his conclusion that 28 U. S. C. § 2255 should be available to contest the admission of evidence allegedly seized in violation of the Fourth Amendment only under limited and special circumstances of the sort suggested in *Thornton v. United States*, — U. S. App. D. C. —, 368 F. 2d 822 (1966). I must, however, disassociate myself from any implications, see, *e. g.*, *ante*, at 1, 4-6, that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation.

I think it appropriate to add that the main roots of the situation against which my Brother BLACK so rightly inveighs are to be found in the Court's decisions in *Townsend v. Sain*, 372 U. S. 293 (1963), and *Fay v. Noia*, 372 U. S. 391 (1963), which have opened wide the gates to collateral re-examination of both state and federal criminal convictions. Be that as it may, the present case offers an opportunity to narrow the entrance in a fair and practicable manner. In rejecting the opportunity, the Court once again* this Term imposes a bur-

*See my dissent in *Gardner v. California*, — U. S. — (1969).

den on the judiciary and on society at large, which results in no legitimate benefit to the petitioner and does nothing to serve the interests of justice.

I therefore dissent from the opinion of the Court.

